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THE LAWS

OF THE

AUSTRALASIAN COLONIES.

WILL SHORTLY BE PUBLISHED.

BY THE SAME AUTHOR.

THE

INTERPRETATION OF MERCANTILE AGREEMENTS:

A SUMMARY OF THE DECISIONS

AS TO THE

MEANING OF EXPRESSIONS IN WRITTEN AGREEMENTS FOR THE SALE OF GOODS, CHARTER-PARTIES, BILLS OF LADING AND MARINE POLICIES.

THE LAWS

OF THE

AUSTRALASIAN COLONIES

AS TO THE

ADMINISTRATION AND DISTRIBUTION

OF THE

ESTATE OF DECEASED PERSONS.

WITH A PRELIMINARY PART

ON THE

FOUNDATION AND BOUNDARIES OF THOSE COLONIES

AND THE LAW IN FORCE IN THEM.

BY

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PREFACE.

THERE are many persons who own property in one of the Australasian Colonies and reside either in another colony or in the United Kingdom. To these persons, and even to persons who do not themselves own property in Australasia but have relations who own property there, it may often be of importance to know what is the law of the colony in which the property is, as to wills, succession in case of intestacy, the duties to be paid, and obtaining probate or letters of administration.

It is for the use of such persons that this work is intended.

The preliminary part is of a wider scope. The Author is indebted to the Hon. EVELYN ASHLEY, M.P., for affording him facilities for examining at the Colonial Office copies of some of the Orders in Council and Letters Patent referred to in that part of this work.

2, HARE COURT TEMPLE,
February, 1884.

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THE LAWS

OF THE

AUSTRALASIAN COLONIES.

PRELIMINARY PART.

THE FOUNDATION AND BOUNDARIES OF THE AUSTRALASIAN COLONIES, AND THE LAW IN FORCE IN THEM.

SECTION I.—THE FOUNDATION AND BOUNDARIES OF THE AUSTRALASIAN COLONIES.

THE Colonies referred to in this work (*a*) are New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria, and Western Australia (*b*).

New South Wales.

Of these the Colony of New South Wales is the oldest. The original Colony of New South Wales

(*a*) Fiji is sometimes included among the Australasian colonies, as, *e.g.*, in the Act of New Zealand, 43 Vict., No. 38; the Intercolonial Probate Act, 1879.

(*b*) The above order being alphabetical has been followed throughout this work, except in this preliminary part, where a chronological order seems preferable.

comprised the territories which now form the Colonies of New Zealand, Queensland, Tasmania (formerly called Van Diemen's Land), and Victoria (formerly called the District of Port Phillip).

The earliest Act of Parliament relating to any of the Australasian Colonies was 27 Geo. III. c. 2 (repealed by the Statute Law Revision Act, 1871), "An Act to enable His Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales and the parts adjacent."

Tasmania (formerly called Van Diemen's Land).

By 4 Geo. IV. c. 96 (continued by 7 & 8 Geo. IV. c. 73, and repealed by 9 Geo. IV. c. 83, s. 39), s. 44, His Majesty was empowered to erect the Island of Van Diemen's Land into a separate colony.

On the 14th June, 1825, an Order in Council was made, which after a recital that it had seemed fit to His Majesty to constitute and erect the Island of Van Diemen's Land and certain Islands, Territories, and Places thereto adjacent, into a separate Colony, independent of the Government of New South Wales, and that the draft of a commission to be passed under the Great Seal, appointing Ralph Darling, Esq., a Lieutenant-General in His Majesty's forces, the first Governor

of the said Island of Van Diemen's Land, Islands, Territories, and Places adjacent had been read at the Board, committed to the Governor and the Chief Justice respectively the same powers, authorities, and jurisdictions within the said Island and its Dependencies, as were or might lawfully be committed to the Governor and Chief Justice respectively of New South Wales.

The commission to Lieutenant-General Darling was dated 16th July, 1825, and appointed him Governor of the Island of Van Diemen's Land and all Islands and Territories lying to the southward of Wilson Promontory, in 39° 12′ of south latitude, and to the northward of 45° of south latitude, and between 140° and 150° of longitude east from Greenwich, and also Macquarrie Island, lying to the southward of the said Island of Van Diemen's Land.

The name of the Colony was changed from Van Diemen's Land to Tasmania by the Act of the legislature of the Colony, 19 Vict., No. 17.

New Zealand.

The sovereignty of Her Majesty over New Zealand is to be dated from 21st May, 1840, or probably as regards the Northern Island, from 5th February, 1840 (see the *London Gazette* of 2nd October, 1840).

By 3 & 4 Vict. c. 62 (now repealed, see the Statute Law Revision Act, 1875), s. 2, Her Majesty was empowered by letters patent, under the Great Seal, to erect into a separate colony or colonies, any Islands which then were, or which thereafter might be, comprised within the Colony of New South Wales. In pursuance of this section, Her Majesty, by letters patent, under the Great Seal, bearing date the 16th November, 1840 (see preamble of 9 & 10 Vict. c. 103), erected into a separate colony the Islands of New Zealand, with all other Islands lying between 34° 30′ north and 47° 10′ south latitude, and between 166° 5′ and 179° of east longitude, reckoning from the meridian of Greenwich.

By 26 Vict. c. 23, it is enacted that the Colony of New Zealand shall be deemed to comprise all Islands lying between 162° of east longitude and 173° of west longitude, and between the 33rd and 53rd parallels of south latitude.

Victoria.

By 13 & 14 Vict. c. 59, s. 1, it was enacted that upon the issuing of the writs for the first election, the territories comprised within the District of Port Phillip, and bounded on the north and north-east by a straight line drawn from Cape Howe to the nearest source of the River

Murray, and thence by the course of that river to the eastern boundary of the Colony of South Australia, should be separated from the Colony of New South Wales, and erected into a separate colony, to be known as the Colony of Victoria. The writs for the first election were issued on the 1st July, 1851, which therefore is the day when Victoria became a separate colony.

The 5th section of 18 & 19 Vict. c. 54, after reciting that doubts had arisen as to the true meaning of the above description of the boundary of the Colony of Victoria, enacted that the whole watercourse of the said River Murray, from its source therein described to the eastern boundary of the Colony of South Australia, should be within the territory of New South Wales; but, nevertheless, that it should be lawful for the Legislatures and for the proper officers of customs of both the said Colonies of New South Wales and Victoria to make regulations for the levying of customs duties on articles imported into the said two Colonies respectively by way of the River Murray, and for the punishment of offences against the customs laws of the said two Colonies respectively committed on the said river, and for the regulation of the navigation of the said river by vessels belonging to the said two Colonies respectively: and also that it should be competent for the Legislatures of the said two

Colonies by laws passed in concurrence with each other to define in any different manner the boundary line of the said two Colonies along the course of the River Murray.

A dispute which had arisen between New South Wales and Victoria on the question whether Pental Island, a large island in the River Murray, belonged to the former or the latter colony, was by consent of both colonies referred to the Judicial Committee of the Privy Council for decision, and decided by that body in 1872 in favour of Victoria.

Queensland.

In virtue of powers supposed to be conferred on the Queen by certain Acts, Her Majesty, by letters patent bearing date the 6th June, 1859 (*c*), separated from the Colony of New South Wales and erected into a separate colony, to be called the Colony of Queensland, so much of New South Wales as lay northward of a line commencing on the sea coast at Point Danger, in latitude about 28° 8′ south, and following the range thence which divides the waters of the Tweed, Rich-

(*c*) See Acts of Queensland (edition in four vols. 1874) vol. i. p. 357.

mond, and Clarence Rivers from those of the Logan and Brisbane Rivers, westerly to the great dividing range between the waters falling to the east coast and those of the River Murray, following the great dividing range southerly to the range dividing the waters of Tinterfield Creek from those of the main head of the Dumaresq River, following that range westerly to the Dumaresq River, and following that river (which is locally known as the Severn) downward to its confluence with the Macintyre River, thence following the Macintyre River, which lower down becomes the Barwan, downward to the 29th parallel of south latitude, and following that parallel westerly to the 141st meridian of east longitude, which is the eastern boundary of South Australia, together with all the adjacent islands, their members and appurtenances in the Pacific Ocean.

These letters were declared by 24 & 25 Vict. c. 44, s. 3, to be valid and effectual.

The Act of the Legislature of Queensland, 43 Vict. No. 1, recites letters patent under the Great Seal of the United Kingdom, dated the 10th October in the 42nd year of Her Majesty's reign, whereby Her Majesty authorised the Governor of Queensland to annex to the colony certain islands if the Colonial Legislature should pass a law providing that they should become part of the

Colony, and enacts that from and after such day as the Governor should by proclamation under his hand and the public seal of the Colony appoint for that purpose certain islands in Torres Straits, lying between the Continent of Australia and Island of New Guinea, that is to say, all islands included within a line drawn from Sandy Cape northward to the south-eastern limit of Great Barrier Reef, thence following the line of the Great Barrier Reefs to their north-eastern extremity, near the latitude of 9½° south, thence in a north-westerly direction embracing East Anchor and Bramble Cays, thence from Bramble Cays in a line west by south (south 79° west, true) embracing Warrior Reef, Saibai, and Tuan Islands, thence diverging in a north-westerly direction, so as to embrace the group known as the Talbot Islands, thence to and embracing the Deliverance Islands, and onwards in a west by south direction (true) to the meridian of 138° of east longitude, should be annexed to and become part of the Colony of Queensland, and be and become subject to the laws in force therein.

Such a proclamation as is referred to in the Act was issued by the Governor of Queensland on the 18th day of July, 1879 (see Supplement to *Queensland Government Gazette* of 19th July, 1879, Vol. II. p. 143), declaring that the Islands should from and after the 1st day of August,

1879, be annexed to and become part of the Colony of Queensland.

Western Australia.

The earliest Act of Parliament relating to Western Australia is 10 Geo. IV. c. 22, continued by various Acts, see preamble of 13 & 14 Vict. c. 59 (repealed by the Statute Law Revision Act, 1873), which after a recital that divers of His Majesty's subjects had by the licence and consent of His Majesty effected a settlement upon certain wild and unoccupied lands on the western coast of New Holland, which settlements had received and were known by the name of Western Australia, enacted that it should be lawful for His Majesty by an Order made with the advice of His Privy Council to authorise and empower three or more persons resident within the said settlements to make laws, provided that no part of the Colonies of New South Wales and Van Diemen's Land as then established should be comprised within the new Colony or Settlements of Western Australia.

Such an Order in Council was made on the 1st November, 1830.

South Australia.

By 4 & 5 Will. IV. c. 95, amended by 1 & 2 Vict. c. 60 (both repealed by 5 & 6 Vict.

c. 61, s. 1), His Majesty was empowered with the advice of his Privy Council to erect and establish within the part of Australia therein described one or more provinces, and to fix the respective boundaries of such provinces.

His Majesty on the 19th February, 1836, by letters patent under the Great Seal, with the advice of his Privy Council, in pursuance of the powers vested in him by the said Act, erected and established a province to be called "The Province of South Australia," and fixed the boundaries thereof as follows (that is to say), on the north the 26th degree of south latitude, on the south the Southern Ocean, on the west the 132nd degree of east longitude, and on the east the 141st degree of east longitude, including therein all and every the bays and gulfs thereof, together with the island called Kangaroo Island, and all and every other island adjacent to the said last-mentioned Island or any part of the Main Land of the said Province.

By 24 & 25 Vict. c. 44, s. 1, it was enacted that so much of the Colony of New South Wales, being to the south of the 26th degree of south latitude, as lay between the western boundary of South Australia and the 129th degree of east longitude, should be detached from the Colony of New South Wales and annexed to the Colony of South Australia.

By 24 & 25 Vict. c. 44, s. 2, power was given to Her Majesty, by letters patent, to annex to any colony then or thereafter to be established on the Continent of Australia certain territories of New South Wales.

By s. 5 of the same Act the Governors of any contiguous colonies on the said Continent were empowered, with the advice of their respective Executive Councils, to determine or alter the common boundary of such colonies.

By letters patent dated 6th July, 1863, reciting 5 & 6 Vict. c. 61 and 24 & 25 Vict. c. 44, Her Majesty annexed to the Colony of South Australia, until she should think fit to make other dispositions thereof or of any part or parts thereof, so much of the Colony of New South Wales as lay to the northward of the 26th parallel of south latitude and between the 129th and 138th degrees of east longitude, together with the bays and gulfs therein and all the islands adjacent to any part of the main land within such limits as aforesaid, with their rights, members and appurtenances, reserving power to revoke, alter, or amend such letters patent.

SECTION II.—THE LAW OF ENGLAND, HOW FAR IN FORCE IN THE AUSTRALASIAN COLONIES.

As the countries which now form the Australasian Colonies, being inhabited only by uncivilized tribes, were regarded as uninhabited, the British subjects who settled in them carried with them all the laws of England then in being, so far as they were applicable to their situation and the condition of a colony (*a*), as for instance the general rules of inheritance. But the laws as to revenue, the maintenance of an established church, the law of mortmain (*b*), and many other laws, being neither necessary nor convenient for them, were never in force (*c*).

It is apprehended that when a portion of the territory of New South Wales was detached from it and erected into a separate colony, such of the laws of New South Wales as were in force in that portion at the time of separation remained (in the absence of any enactment to the contrary) in force in the new colony unless and until

(*a*) Blankard *v.* Galdy, Salk. 441; 1 Blackstone's Comm., p. 117, Introduction, § 4; Mayor of Lyons *v.* East India Company, 1 Moore's P. C. Cas. at 275; Kielley *v.* Carson, 4 Moore's P. C. Cas. at 84 and 85.

(*b*) Whicker *v.* Hume, 14 Beav. 509; 1 De G. MacN. & G. 511; 7 H. L. Cas. 124.

(*c*) 1 Blackstone's Comm., *ubi supra*. See Thurburn *v.* Steward, L. R. 3 P. C. at 510 and 511.

altered by Acts passed by its legislature (*d*). The legislature of New South Wales, however, appears to have considered that doubts might be entertained on this point. (See 14 Vict. No. 49 (*e*).

As regards the Colony of Victoria an express enactment to this effect is contained in the 25th section of 13 & 14 Vict. c. 59 (an Act already referred to, see p. 4). The 1st section of 4 & 5 Will. IV. c. 95 (an Act already referred to, see p. 9), enacted that persons who should at any time thereafter reside in the Province (now called South Australia), should not be subject to or bound by any laws, orders, statutes, or constitutions which had been theretofore made or thereafter should be made or enacted by, for, or as the laws, orders, statutes, or constitutions of any other part of Australia.

New South Wales, Victoria, Queensland, and Tasmania.

The 24th section of 9 Geo. IV. c. 83, passed 28th July, 1828, contains the following enactment: "All laws and statutes in force within the realm of England at the time of the

(*d*) See Reg. *v.* Mount, L. R. 6 P. C. at 291, last three lines, 296, last line, and 297, first two lines.

(*e*) Referred to in Reg. *v.* Mount, L. R. 6 P. C. at 302.

passing of this Act (not being inconsistent herewith, or with any charter or letters patent or Order in Council which may be issued in pursuance hereof), shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said Colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said Colonies respectively, it shall be lawful for the Governors of the said Colonies respectively, by and with the advice of the Legislative Councils of the said Colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such Colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said Colonies respectively as may be deemed expedient in that behalf: Provided always that in the meantime and before any such ordinances shall be actually made it shall be the duty of the said Supreme Courts, as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said Colonies respectively."

According to the opinion of Lord Chelmsford, L.-C., in *Whicker* v. *Hume* (*f*), this statute did not introduce into New South Wales and Van Diemen's Land all the laws of England which were applicable to those Colonies, but only such of them as related to the administration of justice. This expression of opinion, however, was not necessary for the decision of the case, and was not expressly concurred in by the other Law Lords, Lord Cranworth and Lord Wensleydale, and it may rather be inferred from his judgment that Lord Cranworth considered that the statute is not limited to those laws which relate to the administration of justice. In the Courts below, Lord Romilly, M.R. (*g*), and Lord Justice Knight Bruce (*h*), evidently thought that all laws which were applicable were introduced by the statute, and "this view is the one which has been generally adopted in the Colonies" (*i*).

If it is the correct one, all laws in force in England on 25th July, 1828, "so far as they can be reasonably and properly applied" (the meaning put upon the above words "so far as the same can be applied within the said Colonies" by

(*f*) 7 H. L. Ca. at 151.

(*g*) 14 Beav. 509, at 527.

(*h*) 1 De G. MacN. & G. at 511.

(*i*) See Webb's "Imperial Law and Statutes in force in the Colony of Victoria," pp. 18 and 19. See McLean *v.* The Liverpool Association, 9 Victorian Law Reports (Law) at 98 and 100.

Lord Romilly) (*k*), are now in force in New South Wales, Victoria, Queensland, and Tasmania, except in so far as they have been altered by the legislatures of those Colonies.

Western Australia.

The "Index to the Ordinances of Western Australia," "printed by authority at the Government press, Freemantle, W.A.," contains the following note: "All Imperial statutes of a general (as distinguished from local) nature in force in England on the 1st June, 1829, prevail and are in force here, so far as the same are applicable to the state of the colony."

The 1st of June, 1829, appears to be considered as the day on which the settlement was founded by the first Governor (*l*).

(*k*) Whicker *v.* Hume, 14 Beav. at 527. See also 1 De G. MacN. & G. at 511, per Lord Justice Knight Bruce; and 7 H. L. Ca. at 160, per Lord Cranworth.

(*l*) See 2 Rusden's History of Australia, p. 10. It is the day on which the vessel carrying the Governor arrived in the waters of the colony, although the "landing the stores and Civil Establishment" was not commenced until the 18th of the same month. The 18th June, 1829, is the date of a proclamation declaring that the laws of England, so far as they were applicable to the circumstances of the case, prevailed in the Territory." See Colonial Office Papers, Swan River, 1829, vol. i. Captain James Stirling to Horace Twiss, Esq., M.P., and Despatch of Lieutenant Governor Stirling, 10th September, 1829.

South Australia.

The date down to which the laws of England are in force in South Australia is fixed by the Act of the Legislative Council of that colony, 35 & 36 Vict. No. 9, which, after repealing (section 1) an Act of the same purport, enacts (section 3) that in all questions as to the applicability of any laws or statutes of England to the province of South Australia the said province should be deemed to have been established on the 28th day of December, 1836.

New Zealand.

The date as regards New Zealand is fixed by the English Laws Act, 1858 (21 & 22 Vict. No. 2), by which it was enacted that the laws of England as existing on the 14th January, 1840, should, so far as applicable to the circumstances of the Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and should continue to be therein applied in the administration of justice accordingly.

By the Act 4 Vict. No. 1, it had been enacted that the laws made by the Governor and Legislative Council of New South Wales which were then in force therein should be applied in the

administration of justice in New Zealand, but this Act was repealed by 5 Vict. No. 19, by the 2nd section of which it was enacted that no law, Act, or ordinance of New South Wales should, after the Act came into operation, be of any force or effect whatever within New Zealand.

THE LAWS

OF THE

AUSTRALASIAN COLONIES

AS TO THE

ESTATE OF DECEASED PERSONS.

CHAPTER I.

THE LAW OF THE AUSTRALASIAN COLONIES AS TO WILLS.

(7 Will. IV. & 1 Vict. c. 26; 15 Vict. c. 24.)

THE law of England as to the mode in which wills shall be executed and attested is principally contained in the statutes 7 Will. IV. & 1 Vict. c. 26, and the amending statute, 15 Vict. c. 24. The former statute enacts that every will (except that of a soldier in actual military service, or of a mariner at sea) must be in writing, and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, that such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who shall attest and subscribe the will in the presence

of the testator. The Act 15 Vict. c. 24 enacts that every will shall, as regards the position of the signature of the testator or of the person signing for him, be deemed to be valid if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.

New South Wales.

The Act 7 Will. IV. & 1 Vict. c. 26 was adopted in New South Wales (which then comprised the present Colonies of Victoria and Queensland) by the Act of the Legislature of that Colony, 3 Vict. No. 5.

An Act of the Legislature of the Colony of New South Wales (which then comprised the present Colony of Queensland), 17 Vict. No. 5, contains similar provisions to those of 15 Vict. c. 24.

New Zealand.

In New Zealand 7 Will. IV. & 1 Vict. c. 26 is in force by virtue of the Act of the Legislature of that colony, 21 & 22 Vict. No. 22 (see p. 17). See also 18 Vict. Sess. 1, No. 1. The Act 24 Vict. No. 19, adopted 15 Vict. c. 24. The Domi-

cile Act, 1877 (41 Vict. No. 53) contains enactments similar to those of 24 & 25 Vict. c. 114, *mutatis mutandis*.

Queensland.

The Act 7 Will. IV. & 1 Vict. c. 26 was originally in force in Queensland by virtue of the Act of New South Wales, 3 Vict. No. 5 (see p. 20), but the Act 3 Vict. No. 5 was repealed by The Repealing Act of 1867 (31 Vict. No. 39). The statute law as to wills is contained in sections 36 to 65 of 31 Vict. No. 24, "An Act to Consolidate and Amend the Law relating to Dower, Inheritance, Succession, Wills, Powers, Uses, and Remedies, against Realty," the short title of which is The Succession Act of 1867. These sections correspond, with a few necessary omissions, with the 3rd, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, and 33rd sections of 7 Will. IV. & 1 Vict. c. 26, and the 1st and 2nd sections of 15 & 16 Vict. c. 24.

By the 52nd section of The Intestacy Act of 1877 (41 Vict. No. 24), any married woman seised in her own right of land, or any estate or interest in land, may dispose of the same by will as effectually as if she were a *feme sole*, provided

that such will must be acknowledged by her in the same manner as any instrument of conveyance by her *inter vivos* requires to be acknowledged, but her husband's consent is not required to any such will.

South Australia.

In South Australia, 7 Will. IV. & 1 Vict. c. 26 was adopted by the Act of the Legislature of that Colony, 5 Vict. No. 16. The Act (25 & 26 Vict. No. 15) contains provisions similar to those of 15 Vict. c. 24.

Tasmania.

In Tasmania 7 Will IV. & 1 Vict. c. 26 was adopted by the Act, 4 Vict. No. 9. The Act (16 Vict. No. 4) contains provisions similar to those of 14 Vict. c. 24.

Victoria.

In Victoria, 7 Will. IV. & 1 Vict. c. 26 was originally in force by virtue of the Act 3 Vict. No. 5 of the Legislature of New South Wales (see p. 20). The Act 15 Vict. c. 24 was adopted by the Act of the Legislature of the Colony of Victoria, 18 Vict. No. 19. "The Wills Statute, 1864" (Act, No. 222), repealed 3 Vict. No. 5

and 18 Vict. No. 19, but contains enactments similar to those of 1 Vict. c. 26, and 15 Vict. c. 24, omitting only such enactments of the former statute as are inapplicable to the colony, as, for instance, those relating to copyholds.

Western Australia.

In Western Australia 7 Will. IV. & 1 Vict. c. 26 was adopted by the Act of the Legislature of that colony, 2 Vict. No. 1. The Act 18 Vict. No. 13 contains provisions similar to those of 15 Vict. c. 24.

CHAPTER II.

PROBATE AND ADMINISTRATION.

Granting of Probate and Letters of Administration. The Curator. Commission to Executors, Administrators, and the Curator.

New South Wales.

By letters patent under the Great Seal of the United Kingdom, dated the 13th of October, 1823 and commonly known as the Charter of Justice (*a*), issued in pursuance of the 1st and 17th sections of 4 Geo. IV. c. 96 (*b*), it was declared that the Supreme Court of New South Wales should be a Court of ecclesiastical jurisdiction with full power to grant probate of the wills of all persons who should die and leave personal effects within that part of the Colony of New South Wales situated in the Island of New Holland (*c*), and to commit letters of administration of the goods and other effects of the persons aforesaid who should die intestate or who should not have named an

(*a*) The Charter of Justice is set out in full in Clark's "Summary of Colonial Law," pp. 627—638.

(*b*) This Act was repealed by 9 Geo. IV., c. 83, s. 39, but the letters patent were kept in force; see s. 2.

(*c*) New South Wales then included the Islands of New Zealand. See pp. 1, 2.

executor resident within that part of the colony, or where the executor being duly cited should not appear and sue forth such probate, annexing the will to the letters of administration when such persons should have left a will without naming any executor or any person for executor, who should be alive and resident within that part of the Colony, and who, being duly cited, would not appear and sue forth a probate thereof, reserving power where letters of administration should be committed with the will annexed for want of an executor applying in due time to sue forth the probate, to revoke the letters of administration and to grant probate to the executor when he should duly appear and sue forth the same (s. 14). Every person to whom letters of administration shall be committed is required by the Charter of Justice before the granting thereof to give sufficient security by bond for the payment of a competent sum of money with one, two or more able sureties, respect being had in the sum thereon to be contained and in the ability of the sureties to the value of the estates, credits, and effects of the deceased (s. 15). The Supreme Court is further empowered to allow to any executor or administrator of the effects of any deceased person such commission or percentage out of their assets as shall be just and reasonable (s. 17). It seems that the amount usually allowed is 5 per cent. on

small amounts, recovered with difficulty, and 2½ per cent. upon larger amounts, as to which there is no difficulty (*d*).

Rules of Court as to probate and administration were made dated 17 June, 1845 (*e*).

If the attestation clause of a will is in the usual form, or in such a form as to show that the will was properly executed, probate will be granted without an affidavit by an attesting witness, the colonial practice following in this respect the English (*f*).

It has been decided that the words in the Charter of Justice "or who shall not have named an executor resident within that part of the said colony" do not prevent the Court from granting probate to an executor not resident in the colony (*g*).

An affidavit of the death of the testator in the following form, or something equivalent, is now required in all cases (*h*) :

"In the Supreme Court of New South Wales, Ecclesiastical Jurisdiction.

(*d*) *In re* Chadwick's Estate, *Ex parte* Bennett, 2 Wyatt Webb & A'Beckett's Rep. Sup. Court of Vict. (Ins. Eccl. and Matr.) at 51.

(*e*) See In the Will of Logan, 2 N. S. Wales Rep. (Eq.) 98, note (*a*).

(*f*) In the Will of Walsh, 4 N. S. Wales Law Rep. (Eq. and Eccles.) 13.

(*g*) In the Goods of Blackwood, 2 N. S. Wales Law Rep. (Eq. and Eccles.) 83.

(*h*) *Ex relatione* G. P. Slade, Esq., a solicitor of New South Wales, now practising in England.

In the matter of the Will of , late of , deceased, on this day of , in the year 188 , of , being duly sworn, maketh oath and saith, as follows:

1. I saw the above-named after he was dead.

2. He was buried at , and I attended the funeral.

Sworn, &c."

An officer called the Curator of Intestate Estates (see 11 Vict. No. 24, s. 1) may apply to the Supreme Court or one of the Judges for an order authorising him to collect and administer the estate of any deceased person who has left personal property within the jurisdiction (s. 5), if, when the deceased has made a will and named an executor probate or letters of administration with the will annexed shall not be obtained within six months after the death (s. 6), or if, when the deceased has not named an executor of his will or has died intestate, letters of administration are not obtained within three months after the death (s. 8) or at any time after the decease if the Court or Judge shall be satisfied that the effects of the deceased will otherwise be probably purloined, lost, or destroyed, or that great expense will be incurred by delay in the matter (15 Vict. No. 8, s. 1), or that the persons named as executors have re-

nounced probate or that the persons primarily entitled to letters of administration have declined to take out such letters (*Ib.* s. 3), or after the expiration of thirty days from the death if the Court or Judge shall be satisfied that there is no reasonable probability of probate or letters of administration being obtained within the aforesaid periods of six months or three months (*Ib.* s. 2).

Such an order gives the Curator the same power over the personal estate of the deceased as he would have if letters of administration had been granted to him, but does not prevent the person named as executor from proving the will or persons entitled to administration from obtaining letters of administration (11 Vict. No. 24, s. 2). The Curator is entitled to receive the fees mentioned in the schedule to 11 Vict. No. 24, and also a commission at the rate of 5 per cent. on all sums of money collected by him (*Ib.* s. 16).

In New South Wales, land upon the death of the owner intestate in respect of such land, passes to his personal representative: see 26 Vict. No. 20, s. 1, referred to in Chapter V.

New Zealand.

By the Administration Act, 1879 (43 Vict. No. 49), the Supreme Court or the District Court has jurisdiction to grant probate of the will or administration of the estate of any deceased per-

son leaving estate whether real or personal within New Zealand (s. 5). Every person to whom a grant of administration is made must previous to the issue of such administration execute a bond with two sureties in a penalty equal to the amount under which the property of the deceased has been sworn, and in a penalty of £5000 where such amount shall exceed that sum, but the Court may dispense with one or both of the sureties or direct that such penalty shall be reduced in amount, and may also direct that more bonds than one shall be given so as to limit the liability of any surety to such amount as the Court shall think reasonable, and may in place of such bond accept the security of any incorporated company or guarantee society approved by the Governor in Council (ss. 21 and 22).

Power is given to the judges of the Supreme Court to make rules for regulating the practice in obtaining a grant of probate or letters of administration (s. 17). This Act also contains provisions as to the lodging of a caveat against any application for probate or administration and the mode of trial of questions in proceedings arising out of such lodging (ss. 27 to 33).

The Supreme Court may allow, out of the assets of any deceased person, to his executor, administrator, or trustee for the time being in passing his accounts such commission or per-

centage, not exceeding five per cent., for his pains and trouble, as shall be just and reasonable. The Public Trustee (see p. 32) is required to pay into "the Public Trustee's Account" all moneys paid to him or his agents, without any deductions whatever, and from the moneys so paid is to be deducted such amount as shall from time to time be fixed by the Governor in Council, not exceeding seven per cent.

Sections 503 to 517 of the "Code of Civil Procedure in the Supreme Court" (which forms the second Schedule of The Supreme Court Act, 1882), contain the rules in force in New Zealand as to the granting of probate and administration.

By the 503rd section every person named in a will as executor who desires to obtain probate thereof must file an affidavit in the following form, made by some person acquainted with the facts therein set forth.

"I, , of , swear that I knew when alive, and that the said was resident [*or* domiciled] at , within the district, and that the said died at on or about the day of 188 ."

And also the following affidavit:

"I, , of , swear that I believe the writing now produced, bearing date the day of , and marked , to be the last will and testament of , deceased, and that I am the executor [*or* one of the executors] therein named. I swear that I will faithfully execute the said will by paying the debts and legacies of the deceased, as far as the property will extend and the law binds."

The 504th section provides for the case of the residuary legatee, widow, widower, or next-of-kin, obtaining letters of administration with the will annexed, if none of the executors apply for probate within one month after the testator's death, and the 505th for the case of the deceased having left no will, or no will whereby an executor is appointed.

The 506th, 507th, and 508th sections relate to caveats against the granting of probate or letters of administration. The 509th section provides that every person, except the Public Trustee, to whom letters of administration shall be granted, shall give sufficient security for the proper administration of the estate of the deceased.

By the 512th section every executor or administrator is required to file an inventory of the estate and effects of the deceased.

By the Public Trust Office Act Amendment Act, 1873 (37 Vict. No. 27), a Judge of the Supreme Court may make an order that an officer called the Public Trustee (who by the 9th section of the Public Trust Office Act, 1872—36 Vict. No. 26—is a corporation sole), shall administer the estate of any deceased person who was entitled to personal estate within New Zealand if the Judge shall be satisfied that no grant of probate or letters of administration relating to the estate within New Zealand has been made, and that no person entitled and within New Zealand is ready to take such grant, and that such estate is liable to loss or injury, or if three months have elapsed since the death and no administration shall have been taken out without proof that no person is ready to take such grant or that the estate is so liable (s. 4). Every such order shall give to and impose on the Public Trustee the same rights and liabilities as if letters of administration had been granted to him (s. 7). Notwithstanding any such order the Supreme Court may grant probate or letters of administration of the estate of the deceased to any person entitled thereto (s. 18), whereupon the rights and liabilities of the Public Trustee cease (s. 19, and The Administration Act, 1879, s. 34.)

In New Zealand, upon the granting of probate

of the will or administration of the estate of any deceased person, all his real estate vests in the executor or administrator (see 38 Vict. No. 84, s. 6), referred to in Chapter V.

By the Intercolonial Probate Act, 1879 (43 Vict. No. 38), whenever any probate or letters of administration granted by the Supreme Court of any of the other Australasian Colonies, including Fiji (whether before or after the passing of the Act), shall be produced to and a copy thereof deposited with the Registrar of the Supreme Court of New Zealand, such probate or letters of administration shall (after payment of such duties and fees as would have been payable of probate or letters of administration had been originally granted in New Zealand) be sealed with the seal of the Supreme Court of New Zealand, and have the same effect as if such probate or letters of administration had been originally granted by the Supreme Court of New Zealand.

By the Trustees, Executors, and Agency Company Act, 1882 (1882, No. 4, Private), a company incorporated by the name of the Trustees, Executors, and Agency Company of New Zealand, Limited, is authorised to act as executor, and to receive a commission not exceeding five per cent. on all sums received by it as executor.

Queensland.

By the Intestacy Act of 1877 (*a*) (41 Vict. No. 24), the Supreme Court or a Judge may make an order authorising the Curator of Intestate Estates to administer the goods (that is, the leasehold lands, debts, choses in action, goods, and other property whatsoever, not being land, see s. 1) of a deceased person upon the Curator's application (s. 31), if probate or letters of administration with the will annexed are not obtained within six months after the death, where the deceased has made a will naming an executor (s. 32), or if letters of administration are not obtained within three months after the death, where the deceased died intestate or without having named an executor (s. 33), or if satisfied that any of the effects of the deceased will otherwise probably be purloined, lost, or destroyed, or that great expense will be incurred by delay in the matter (s. 34), or that there is no reasonable probability of probate or letters of administration being obtained within the aforesaid period of six months or three months (as the case may be), after the death (s. 35), or that the persons named as executors have renounced probate, or that the deceased has left no next-of-kin in the colony,

(*a*) As to succession to real estate upon intestacy, see Chapter V.

or that all the persons resident within the Colony primarily entitled to letters of administration have declined to take out such letters (s. 36).

Any person may by his will appoint the Curator sole executor or trustee thereof, and in every such case the Curator is bound to apply for probate of the will, or to execute the office of trustee thereof (s. 53).

The order to administer gives the Curator the same power over the goods of the deceased as he would have had if letters of administration had been granted to him (s. 31).

A commission of 5 per cent. on all sums of money collected or received by him is payable to the Curator (s. 8).

By the 8th section of "The Probate Act, 1867" (31 Vict. No. 9), the practice in the Supreme Court as to probate and letters of administration is, except where otherwise provided, to be, so far as the circumstances of the case will admit, according to the practice of the Court of Probate in England. This Act contains enactments similar to those of 20 & 21 Vict. c. 77, ss. 24, 25, 26, 31, 61, 62, 63, 67, 69, 70, 71, 72, 73, 75, 77, 78, 79 and 86; and of 21 & 22 Vict. c. 95, ss. 3, 5, 16, 18, 19, 21, 23, and 24.

Sections 109 to 119 of the Equity Act of 1867 (31 Vict. No. 18) contain enactments as to orders for the administration of the estates of deceased

persons similar to those of 15 & 16 Vict. c. 86, ss. 45, 46 and 47, and 13 & 14 Vict. c. 35, ss. 19, 20, 21, 22, 23, 24 and 25.

In Queensland if a person shall not by his will have disposed of any land, it passes to and becomes vested in the Curator of Intestate Estates until an administrator of such land is appointed. (See 41 Vict. No. 24, ss. 11 and 12, referred to in Chapter V.)

South Australia.

By the Testamentary Causes Act, 1867 (31 Vict. No. 11), the Supreme Court was invested with the same voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills, and letters of administration, as immediately after the coming into operation of the Court of Probate Act, 1858, were vested in the Court of Probate in England (s. 6), and the practice of the Supreme Court in its testamentary causes jurisdiction was, except where otherwise provided by the Act or by the rules to be made under the Act, to be according to the practice of the Court of Probate immediately after the coming into operation of the Court of Probate Act, 1858 (s. 14). With the exception of the second part (which relates to the Curator of Intestate Estates), the greater part of the Colonial Act is a re-enactment, *mutatis mutandis*, with occasional slight variations of English Acts.

The second column contains a reference to the section of the English Act of which the Colonial Act is substantially a re-enactment.

The Testamentary Causes Act, 1867.	
S. 4.	S. 2. The Court of Probate Act, 1857 (20 & 21 Vict. c. 77).
S. 7	S. 23. Proviso. *Ib.*
S. 8.	S. 19. The Court of Probate Act, 1858 (21 & 22 Vict. c. 95).
Chief Justice being substituted for "Judge of the Court of Probate," ss. 9 and 10 authorise the appointment of a Registrar of Probates, with the same power and authority as possessed by the Registrars of the Principal Registry of the Court of Probate.	
S. 15	S. 24. The Court of Probate Act, 1857.
S. 16	S. 26. *Ib.*
S. 17	S. 35. *Ib.*
S. 18	S. 37. *Ib.*
S. 19	S. 33. *Ib.*
S. 20	S. 31. *Ib.*
S. 21. Caveats may be lodged in the office of the Court .	S. 53. *Ib.*
S. 22	S. 61. *Ib.*
S. 23	S. 62. *Ib.*
S. 24	S. 63. *Ib.*
S. 25	S. 64. *Ib.*
S. 26	S. 65. *Ib.*
S. 27	S. 66. *Ib.*
S. 28	S. 69. *Ib.*
S. 58	S. 81. *Ib.*
S. 59	S. 82. *Ib.*
S. 60	S. 83. *Ib.*
S. 64	S. 87. *Ib.*
S. 65	S. 75. *Ib.*

The Testamentary Causes Act, 1867.—*continued.*	
S. 66	S. 79. *Ib.*
S. 67	S. 73. *Ib.*
S. 68	S. 1. 38 Geo. III., c. 87.
S. 69	S. 2. *Ib.*
S. 74	S. 76. The Court of Probate Act, 1857.
S. 75	S. 77. *Ib.*
S. 76	S. 78. *Ib.*
S. 78	S. 25. *Ib.*
S. 80	S. 30. *Ib.*
S. 81	S. 119. *Ib.*

When any executor, widow, or next of kin shall be out of the jurisdiction, but shall have appointed some person by power of attorney to act for him, her, or them, probate or letters of administration may be granted to such agent on behalf of the person entitled thereto (s. 39).

The Testamentary Causes Act, 1867, authorised the Governor to appoint a Curator of Intestate Estates, and defined his powers and duties; but by the 9th section of the Public Trustee Act, 1880 (43 & 44 Vict. No. 188), it was enacted that the office should cease to exist, and that his powers and duties, and all estates then vested in him, should be vested in an officer designated the Public Trustee, who is by the Act constituted a body corporate (s. 4). The Public Trustee may apply to the Supreme Court, or a Judge thereof, for an order authorising him to collect and administer the estate of any deceased person who

has left personal estate within the jurisdiction (Testamentary Causes Act, 1867, s. 32), if the deceased has died beyond the jurisdiction of the Court, and there is no widow or lawful next of kin resident within the jurisdiction (s. 33), or if the deceased has made a will and named an executor thereof, and bequeathed personal property within the jurisdiction, and probate or letters of administration with the will annexed have not been obtained within six months after the death (*Ib.* s. 34), or if the deceased has died intestate, and letters of administration have not been obtained within three months after the death (s. 35). The effect of such an order is to give the Public Trustee the same power over the personal estate of the deceased as he would have had if letters of administration had been granted to him (s. 32), except that such order does not prevent the proving of any will, or the obtaining of a grant of letters of administration, or affect the powers of any executor or administrator of the estate (s. 40).

If any person dies intestate, and not leaving any heir or lawful representative within the jurisdiction, and possessed of real estate which may be liable to be injured, an order may be made authorising the Public Trustee to take charge of such estate, and he may thereupon receive the rents and demise for any term not exceeding

seven years (s. 36), and under certain circumstances sell it with the leave of the Court or a Judge (s. 37). The Court or a Judge if satisfied that there is reasonable ground to suppose that any person has died out of, leaving property within, the jurisdiction of the Court may empower the Public Trustee to collect and manage the estate, both real and personal, of such person without requiring strict legal proof of his death, but in such case he is not to proceed to any distribution of the assets without a special order of the Court (s. 38).

Any person may by his will appoint the Public Trustee executor or trustee thereof, either solely or jointly with any other person, and in such case he is required to accept the trust; but where he is appointed executor or trustee jointly with any other person, all moneys received on account of the estate must be received and held by him alone (The Public Trustee Act, 1880, s. 24.)

The Act authorises (subject to a power in the Governor from time to time to reduce or increase the rate) a charge of the following commission (s. 29) on all moneys received by the Public Trustee on account of estates coming under his control, exclusive of commissions and expenses necessarily paid to auctioneers or agents, legal costs, and cash disbursed for postages, telegrams,

advertising, surveys, valuations, travelling expenses, and other expenses incurred for the benefit of the estate, viz. :—

For realising the property of an estate :—

Not exceeding £10,000	£2½ per cent.
For the excess over £10,000	£1 per cent.

For collecting rents, interest, dividends or profits :—

For the first £1,000	£5 per cent.
Over £1,000	£2½ per cent.

For the investment of money :—Nil.

By the 77th section of the Testamentary Causes Act, 1877, the Court or a Judge may allow to any executor or administrator (if he has not neglected to pass his accounts, or duly to administer the estate) such commission or percentage out of the assets as shall be just and reasonable for his pains and trouble.

In South Australia all lands of a deceased person which he has not devised become vested in his personal representative (see 31 Vict. No. 29, s. 1, referred to in Chap. V.).

By the Intercolonial Probate Act (43 Vict. No. 137) when any probate or letters of administration, or any exemplification or other formal document purporting to be under the seal of a court of competent jurisdiction, which shall in the

opinion of a judge of the Supreme Court be deemed sufficient evidence of a probate or letters of administration, shall be produced to, and a copy thereof deposited with, the Registrar of the Supreme Court, and all such duties as would have been payable if such probate or letters of administration had been originally granted in South Australia, shall have been paid, such probate, letters of administration, exemplification, or other document shall be sealed with the seal of the Supreme Court, and shall have the same effect and operation in South Australia, and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities as if such probate or letters of administration had been originally granted by the Supreme Court.

Tasmania.

A judge of the Supreme Court may, by the 22nd section of the Deceased Persons' Estates Act, 1874 (38 Vict. No. 1), grant probate or letters of administration. Every person applying for probate or letters of administration must file an affidavit of the value, and an inventory of the personal estate of the deceased (see the Probate Duties Act—32 Vict. No. 1—s. 4, and the Deceased Persons' Estates Act, 1881—45 Vict. No. 12—s. 2).

The rights of any person who has been appointed executor, and who renounces executorship, wholly cease (The Deceased Persons' Estates Act, 1881, s. 1).

Every person to whom a grant of administration is made must previously to the issue of the letters execute a bond with two sureties in a penalty equal to the amount under which the property of the deceased is sworn if such amount does not exceed £5,000, and in a penalty of that amount where such amount shall exceed that sum; but a judge may in any case dispense with one or both of the sureties, or direct that such penalty shall be reduced in amount, or that more bonds than one shall be given so as to limit the liability of any surety to such amount as he thinks reasonable, and may in place of such bond accept the security of any incorporated company or guarantee society approved of by the Governor in Council (The Deceased Persons' Estates Act, 1874, ss. 23 and 24).

The Court or a Judge may allow out of the assets of any deceased person to his executor, administrator, or trustee (if he has not neglected to pass his accounts), a commission or percentage not exceeding 5 per cent. for his pains and trouble (*Ib.* s. 26).

By 17 Vict. No. 4, An Act for the better Preservation and Management of the Estates of

Deceased Persons, in certain cases, an officer called the Curator of Intestate Estates, may apply to the Supreme Court or a Judge for an order authorising him to collect and administer the estate of any deceased person (s. 2), who has left real (see The Deceased Persons' Estates Act, 1874 —38 Vict. No. 1—ss. 18 and 20), or personal estate within the jurisdiction (17 Vict. No. 4, s. 5), if, when a person has named an executor of his will, probate or letters of administration with the will annexed, are not obtained within six months after the death, or if, when the deceased has died intestate or without having named an executor of his will, letters of administration are not obtained within three months after the death, or if, when probate or administration has not been obtained within thirty days after the death the Court or a Judge shall be satisfied that there is no reasonable probability of probate or letter of administration being obtained within the above-mentioned respective periods of six months or three months (s. 9), or if, when probate or administration has not been obtained, the Court or a Judge shall be satisfied that the effects of the deceased will otherwise be liable to be lost, wasted, or destroyed, or that great expense will be incurred by delay in the matter, and before probate or letters of administration can be taken out or obtained (s. 8), or if, the Court or a Judge shall be satisfied that

the person named as executor has renounced, or that the persons primarily entitled to administration have, by a memorandum filed in the office of the Registrar, declined to take out such letters (s. 10). The effect of such an order is to give the Curator the same power over the real (see 38 Vict. No. 1, ss. 18 and 20) and personal estate of the deceased as he would have had if letters of administration had been granted to him; but such an order is not to prevent the proving of any will or the obtaining of letters of administration, or to limit or affect the powers or duties of any executor or administrator (17 Vict. No. 4, s. 2).

The Curator is empowered to receive the fees mentioned in the Schedule to 17 Vict. No. 4, and also a commission (s. 22) on all sums of money collected by him on account of any estate, whether derived from the real or the personal estate (38 Vict. No. 1, s. 21) according to the following scale, namely:—If such sums do not exceed £100, 10 per cent.; if they exceed £100, and do not exceed £1,000, 5 per cent.; and if they exceed £1,000, 2½ per cent.

In Tasmania, land upon the death of the owner intestate in respect of such land, passes to and becomes vested in his personal representative (see 38 Vict. No. 1, s. 4, referred to in Chapter V.).

By the International Probate Act (42 Vict.

No. 26) when any probate or letters of administration granted by the Supreme Court of any of the Colonies of New South Wales, New Zealand, Queensland, South Australia, Victoria, or Western Australia, or an exemplification of such probate or letters of administration shall be produced to, and a copy thereof deposited with, the Registrar of the Supreme Court, and all such duties as would have been payable if such probate or letters of administration had been originally granted in Tasmania have been paid, and, in the case of letters of administration, such bond has been entered into as would have been required if such letters had been originally granted by the Supreme Court of Tasmania, such probate, letters of administration, or exemplification shall be sealed with the seal of the Supreme Court of Tasmania, and shall have the same effect and operation in Tasmania, and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities as if such probate or letters of administration had been originally granted by the Supreme Court.

Victoria.

The statute law of Victoria as to the granting of probate and letters of administration, is contained in the 15th and 16th sections of 15 Vict. No. 10, "An Act to make provision for the better administration of justice in the Colony of Victoria," Act No. 230, "An Act to make undevised real estate distributable among next-of-kin, and to provide for the administration of the estates of deceased persons in certain cases" (the 4th, 5th, 6th, 7th, 14th, and 32nd sections, and the second, third, and fourth schedules of which have been repealed by No. 427, s. 2), and the Administration Act, 1872 (Act No. 427). By the 15th section of the first of these Acts, the Supreme Court has ecclesiastical (now called probate—see The Administration Act, 1872, s. 2) jurisdiction within the colony, and has power and authority to grant probate of the will of any person who shall die leaving personal effects within the colony, and to commit letters of administration of all the personal effects within the colony of any person who shall die intestate, and to commit letters of administration with the will annexed of all the personal effects within the colony of any person who shall have made a will without having named an executor thereof, or without having named an executor thereof resident

within the colony, or where the executor being duly cited, shall not appear and sue forth probate (with reservation in any of the two last-mentioned cases, to revoke such letters of administration, and to grant probate of the will to the executor therein named, when he shall appear and sue forth such probate), such letters of administration to be committed to any person, whether of kin to, or a creditor of the person so dying, or not, as to the Court shall seem meet.

If the testator names an executor not resident in Victoria, the practice is not to grant probate to the executor (*a*), but letters of administration with the will annexed to his attorney (*b*): (if the power names two attorneys the practice is to grant administration to one only (*c*)). However, where both executors were resident in New South Wales but at a town on the Murray, the river which forms the boundary between Victoria and New South Wales, Molesworth, J., granted probate "without dealing generally with the position of executors out of the jurisdiction" (*d*), and in

(*a*) In the Will of Slack, 8 Vict. Law Rep. (Ins. Prob. and Matr.) 23.

(*b*) For cases where this has been done, see In the Goods of Webster, 3 Wyatt, Webb & A'Beckett (Insolvency Eccles. and Matr.) 70; In the Estate of Von Stieglitz, 3 Victorian Law Rep. (Ins. Prob. and Matr.) 35.

(*c*) In the Estate of Donald, 4 Victorian Law Rep. (Ins. Prob. and Matr.) 46; In the Will of Macdougall, *ibid.*, vol. 7, p. 23.

(*d*) In the Will of Burke, 5 Victorian Law Rep. (Ins. Prob. and Matr.) 69.

another case probate was granted to an executor resident in Sydney, but who was in the habit of making frequent and protracted visits to Victoria, but the security usual in the case of a grant of administration was required (*e*).

If the real and personal estate of the deceased does not exceed £500, and no caveat has been entered, the registrar of probates and administrations may, upon application to him, or to the registrar of any county court, grant probate or administration in the name and under the seal of the Supreme Court (the Administration Act, 1872, ss. 18 and 19).

Rules (*f*), dated 23rd June, 1873, have been made by the judges of the Supreme Court under the powers conferred on them by the 17th section of the last-named Act. According to these rules no probate or administration shall be granted to any person except after the expiration of fourteen days from the publication of an advertisement in one of the Melbourne newspapers, of his intention to apply for the same.

Every application for probate or letters of administration, with the will annexed, must be supported by an affidavit or affidavits setting

(*e*) In the Will of Neville, 8 Vict. Law Rep. (Ins. Prob. and Matr.) 29.

(*f*) See the Victorian Statutes, Melbourne. Printed by John Ferres, Government Printer, 1877, vol. 4, pp. 2795 to 2800.

forth the death of the testator, the time of his decease, that he has left a will, the date thereof, the name and residence of each executor, and of each of the subscribing witnesses thereto, an identification or statement of the contents thereof, a statement of the value of the property, distinguishing real and personal, a search in the Registrar General's office for any other will deposited, the publication of advertisement, and that no caveat has been lodged up to the morning of the application, and if the will has been executed by the testator affixing his mark thereto, then an affidavit of the due execution thereof, and of the cause of it being by mark, must also if possible be made by one or more of the subscribing witnesses thereto.

If the will has been proved in England (*g*), or elsewhere (*h*), either the original probate or an exemplification under the seal of the Court granting it, must be produced (*g*). Some evidence is required that the deceased had property in the country where probate has been granted (*i*), although if it appears by the exemplification that the assets have been sworn under a certain sum

(*g*) In the Goods of Whitaker, 2 Wyatt & Webb (Ins. Eccles. and Matr.) 114.

(*h*) In the Estate of Severne, 6 Victorian Law Rep. (Ins. Prob. and Matr.) 1.

(*i*) In the Estate of Von Stieglitz, 3 Victorian Law Rep. (Ins. Prob. and Matr.) at 36; In the Will of Grove, *ibid.*, vol. 5., p. 88; In the Estate of Piper, *ibid.*, vol. 8, p. 45.

upon which duty has been paid, this seems to be sufficient evidence (*k*).

Every application for letters of administration by a person not applying as a creditor, must be supported by an affidavit or affidavits setting forth the death of the deceased, the time of his decease, that he died intestate leaving property in Victoria, specifying its value, distinguishing real and personal, what relatives or next-of-kin he left surviving him as far as the same may be known, and material by law to the right to administer or share in his property, the character in which the person making the application claims to be entitled, and the truth thereof, that the applicant has carefully inquired if there be a will, a search made in the Registrar General's office for a will deposited, the publication of advertisements, and that no caveat has been lodged up to the morning of the application (see Rules, s. 5).

Executors and persons proposed as administrators must also file an affidavit in a prescribed form, promising the due performance of their duties (*Ibid.*, s. 7). Every administrator must, with two sureties, enter into a bond conditional for duly collecting and administering the real and personal estate of the deceased, in a penalty equal to the amount under which the property

(*k*) In the Goods of Brewster, 3 Wyatt, Webb and A'Beckett (Ins. Eccles. and Matr.), 70.

of the deceased shall be sworn, if such amount shall not exceed £5000, and of £5000 where such amount shall exceed that sum; but the Supreme Court may in any case dispense with one or both of the sureties, or direct that such penalty shall be reduced in amount, or that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court shall think reasonable; or may in place of such bond accept the security of any incorporated company or guarantee society approved by the Governor in Council (The Administration Act, 1872, ss. 26 and 27); but no administrator is to be allowed the price he may pay for procuring the security, either of individuals or of such company or society, as an expense of administration (Rules, s. 12). By the 37th section of the Judicature Act, 1883 (No. 761), all rules and orders of Court in force at the time of the commencement of the Act relative to probate, are to remain in force until they shall be annulled or altered by any rule of Court made after the commencement of the Act.

An officer, styled the Curator of the Estates of Deceased Persons, is required, upon receiving information of the death of any person (whether in Victoria or elsewhere), possessed of or entitled to personal estate within Victoria, to apply to the Supreme Court or a judge at chambers (The

Administration Act, 1872, s. 20) for a rule to administer the same; but no such rule can be granted unless the Court or judge shall be satisfied that no grant of probate of any will, or letters of administration relating to the estate within Victoria of such deceased person, has been made, and that no person entitled and within Victoria is ready to take such grant, and that such estate or some part thereof, is exposed and liable to loss, waste, or injury (Act No. 230, s. 12). The effect of the making of such a rule is to give the Curator the same rights as if letters of administration had been granted to him (*Ib.*, s. 19), and so to vest in him all the real (*l*) and personal estate of the deceased (The Administration Act, 1872, s. 6).

Any person may by his will appoint the Curator to administer his estate, and in that case the Curator is bound to apply for a rule to administer (No. 230, s. 13).

If the office of Curator becomes vacant, all the estate of any deceased person left unadministered by him vests in his successor on his appointment, and by virtue thereof (No. 230, s. 11.) The making of a rule authorising the Curator to administer to the estate of any deceased person

(*l*) See In the Estate of Hanna, 7 Victorian Law Rep. (Ins. Prob. and Matr.) at 46, lines 3 to 10.

does not prevent the Supreme Court from subsequently granting probate of the will or letters of administration of the estate of such person (*Ib.*, s. 25).

A caveat may be lodged against the granting of probate or administration, and any questions of fact may be tried by a jury or by a judge alone (The Administration Act, 1872, s. 4).

Probate as granted in Victoria is to be regarded as analogous rather to probate granted in common form than in solemn form (*m*), and may be revoked; and any questions arising in a suit for revocation may be tried by a jury or by a judge alone, and upon affidavits or by *viva voce* evidence (*n*).

The Master in Equity may allow out of the assets of any deceased person to his executor, administrator, or trustee, in passing his accounts, a commission not exceeding 5 per cent. for his pains and trouble (The Administration Act, 1872, s. 25) (*o*).

The fact that the testator has given a legacy to

(*m*) *In re* Pyke, 1 Wyatt & Webb (Ins. Eccles. and Matr.) 20, at 28 and 31.

(*n*) *In re* Pyke; In the Will of Lament, 7 Victorian Law Rep. (Ins. Prob. and Matr.) 86.

(*o*) For decisions as to the amount to be allowed to executors, see, among others, In the Will of Kay, 2 Victorian Law Rep. (Ins. Prob. and Matr.) 94; In the Estate of Sargood, *ibid.*, vol. 4, p. 43; In the Estate of McLean, *ibid.*, vol. 7, p. 19; Westwood *v.* Kidney, *ibid.*, vol. 1, (Eq.) 65; Attorney-General *v.* Huon, *ibid.*, vol. 7 (Eq.) 30.

the executors does not necessarily disentitle them to commission (*p*); but if a legacy, however small (*q*), is expressed to be given as a remuneration for the trouble entailed on them in carrying out the trusts of the will, this is a clear indication that he did not intend them to receive any other payment out of his estates (*r*).

By the Executors Companies Act (No. 644), a company incorporated under "The Companies Statute, 1864," by the name of the Trustees, Executors, and Agency Company, Limited, is authorised to act as executor, and to obtain letters of administration (ss. 1 & 2), receiving a commission not exceeding 5 per cent. (*s*).

A percentage of such amount as shall be fixed by the Governor in Council, but not exceeding 5 per cent. is charged upon estates administered by the Curator (No. 230, s. 31).

In Victoria all the hereditaments of any deceased person vest as from his death in his executor or administrator. (See No. 427, s. 6, referred to in Chapter V.)

(*p*) In the Will of Millin, 2 Victorian Law Rep. (Ins. Prob. and Matr.) 86; In the Will of Kay, *ibid.*, p. 94; In the Estate of Sargood, *ibid.*, vol. 4, p. 43.

(*q*) In the Will of Richmond, *ibid.*, vol. 8, p. 22.

(*r*) In the Will of Riley, Victorian Law Rep. (Ins. Prob. and Matr.) vol. 4, p. 28; In the Will of Fellows, *ibid.*, vol. 5, p. 82.

(*s*) See In the Will of Reynolds, 7 Victorian Law Rep. (Ins. Prob. and Matr.) 61.

Western Australia.

By the Supreme Court Ordinance, 1861 (24 Vict. No. 15), the Supreme Court has power to grant probates and letters of administration. Every person to whom letters of administration shall be committed, must before the granting thereof give sufficient security by bond.

The 6th, 7th, 8th, and 9th sections of this Act are the same *mutatis mutandis* as the 14th, 15th, 16th, and 17th sections of the Charter of Justice of New South Wales, *vide ante*, pp. 24 and 25.

The Rules of Court made 14th July, 1881, under the Supreme Court Act, 1880 (44 Vict. No. 10) contain a few provisions respecting probate actions. By Order XXII. r. 4, it is provided that in probate actions the party opposing a will may in his defence give notice to the party setting up the will, that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will.

By the Deceased Persons Estate Act, 1883 (47 Vict. No. 20) on the death of any person who dies leaving real or personal estate in the Colony which shall appear to the Supreme Court to be unprotected or liable to waste, an order may be made that such estate shall vest in an officer styled the Curator of Intestate Estates until pro-

bate or letters of administration shall be granted, or in case of real estate until entry therein by the heir or devisee. Until such grant or entry the Curator has all the rights of a duly constituted representative devisee or trustee for the purpose only of collecting and preventing waste. The Curator may receive remuneration as directed, not exceeding 5 per cent. on the value of personal, and 1 per cent. on that of the real estate. The Curator's estate ceases on the grant of probate or letters of administration or such entry as aforesaid. If twelve years elapse from the time when any real or personal estate shall have vested in the Curator, and no probate or letters of administration have been granted and no entry has been made, and there is no action pending respecting the estate, it vests absolutely in and becomes the property of the Crown.

By the Foreign Probate Act (43 Vict. No. 5) when any probate or letters of administration granted by a court of competent jurisdiction in any part of Her Majesty's dominions shall be produced to and a copy thereof deposited with the Registrar of the Supreme Court of Western Australia, such probate or letters of administration shall be sealed with the seal of the Supreme Court, and shall have the like force and effect in the colony, and every executor and administrator thereunder shall have the same powers and be

subject to the same liabilities as if such probate or letters of administration had been originally granted by the Supreme Court. The seal is not to be affixed until all such probate, stamp and other duties (if any) have been paid as would have been payable if the probate or letters of administration had been originally granted by the Supreme Court. Letters of administration are not to be sealed until a bond has been entered into by the executor or administrator or his attorney or agent, with or without one or more sureties, as the Supreme Court may in such case direct, conditioned for the due administration of the estate of the testator or intestate, as the case may be.

CHAPTER III.

THE ADMINISTRATION OF THE ESTATE OF DECEASED PERSONS.

SECTION I.—REAL ESTATE LIABLE TO PAYMENT OF MORTGAGE DEBTS.

(17 & 18 Vict. c. 113 ; 30 & 31 Vict. c. 69 ; 40 & 41 Vict. c. 34.)

BY 17 & 18 Vict. c. 113 (commonly known as Locke King's Act) if a person dies entitled to any estate or interest in any land which shall at the time of his death be charged with the payment of any sum of money by way of mortgage or (see 30 & 31 Vict. c. 69, s. 2, and 40 & 41 Vict. c. 34) any other equitable charge, including any lien for unpaid purchase money, and shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee is not entitled to have the debt discharged or satisfied out of the personal estate or any other real estate of such person, and such land is to be primarily liable to the payment of all debts with which the same shall be charged. By 30 & 31 Vict. c. 69, s. 1, a general direction that the testator's debts shall be paid out of his

personal estate shall not be deemed to be evidence of such a contrary or other intention.

Acts have been passed in all the Australian colonies similar to 17 & 18 Vict. c. 113, and in some of them Acts have been passed similar to 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34.

New South Wales.

The Act of New South Wales, 19 Vict. No. 1, is similar to 17 & 18 Vict. c. 113.

New Zealand.

The Act 19 Vict. No. 3 ("The English Acts Act" 1855) adopts 17 & 18 Vict. c. 113.

The 2nd section of "The Deceased Persons Estates Act, 1870" (33 & 34 Vict. No. 5) is similar to the 1st section of 30 & 31 Vict. c. 69.

Queensland.

Queensland was comprised in New South Wales when Act 19 Vict. No. 1 was passed, but 19 Vict. No. 1 was repealed by 31 Vict. No. 39 ("The Repealing Act of 1867"). The 78th section of 31 Vict. No. 18 ("The Equity Act of 1867") is similar to 17 & 18 Vict. c. 113.

South Australia.

The Act 28 & 29 Vict. No. 5 of South Australia is similar to 17 & 18 Vict. c. 113.

Tasmania.

The Act of Tasmania, 22 Vict. No. 19, was similar to 17 & 18 Vict. c. 113, and 33 Vict. No. 12, to 30 & 31 Vict. c. 69. Both these Acts were repealed by "The Deceased Persons Estates Act, 1874," (38 Vict. No. 1, s. 33), but these provisions were re-enacted by the 28th & 29th sections of that Act.

Victoria.

Act No. 61 of the Colony of Victoria was similar to 17 & 18 Vict. c. 113. This Act was repealed by the 2nd section of the "Real Property Statute, 1864" (Act No. 213), but its provisions were re-enacted by the 150th section of that Act (*t*).

Western Australia.

The Act 17 & 18 Vict. c. 113, was adopted by the Act of Western Australia, 31 Vict. No. 8. Act 34 Vict. No. 1, is similar to 30 & 31 Vict. c. 69, and 43 Vict. No. 11 to 40 & 41 Vict. c. 34 (an Act which amended 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, by extending them to the case of a person dying entitled to land

(*t*) For decisions on this section, see Macartney *v.* Kesterton, 6 Victorian Law Rep. (Eq.) 56; Brown *v.* Abbot, *ibid.*, vol. 7 (Eq.), 121.

charged with the payment of any equitable charge, including any lien for unpaid purchase money).

Section II.—Specialty and Simple Contract Debts placed on equal footing.

By the Imperial Act, 32 & 33 Vict. c. 46, it was enacted that in the administration of every person who should die on or after the 1st of January, 1870, all his creditors as well specialty as simple contract, should be treated as standing in equal degree, and be paid accordingly out of his assets whether legal or equitable.

Similar enactments are in force in

New South Wales.

See the "Debts of Deceased Persons Act" (45 Vict. No. 2). (See also Real Estate of Intestates' Distribution Act of 1862, s. 2, post, Chapter V.)

New Zealand.

See the Administration Act, 1879 (43 Vict. No. 49) s. 14. (See also the Administration Act, 1879, s. 6, post, Chapter V.)

Queensland.

See the Specialty and Simple Contract Debts Equalisation Act (34 Vict. No. 27). (See also the

Intestacy Act of 1877, 41 Vict. No. 24, s. 39, post, Chapter V.)

South Australia.

See 42 & 43 Vict. No. 140. (See also the Intestate Real Estates Distribution Act, 1867, s. 1, post, Chapter V.)

Tasmania.

See the Deceased Persons Estates Act, 1874 (38 Vict. No. 1), s. 31.

Victoria.

See the Administration Act, 1872 (No. 427), s. 12.

Western Australia.

See 34 Vict. No. 12.

Section III.—Real Estate Assets for the Payment of Debts.

(11 Geo. IV. & 1 Will. IV. c. 47; 2 & 3 Vict. c. 60; 11 & 12 Vict. c. 87; 54 Geo. III. c. 15, s. 4; 3 & 4 Will. IV. c. 104.)

New South Wales.

The Imperial Act, 11 Geo. IV. and 1 Wm. IV. c. 47: "An Act for consolidating and amending the laws for facilitating the payment of debts out

of real estate," was applied to New South Wales (*u*) by the Act of the Legislature of that colony, 5 Will. IV. No. 8. Two Imperial Acts, 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87, have been passed, the former "to explain and extend," and the latter "to extend the provisions of" 11 Geo. IV. and 1 Will. IV. c. 47 : the Act of New South Wales, 21 Vict. No. 6, contains enactments similar to those contained in these two Acts.

New Zealand.

As to 11 Geo. IV., and 1 Will. IV. c. 47, and 2 & 3 Vict. c. 60, being in force in New Zealand, see the English Laws Act, 1858 (21 & 22 Vict. No. 2), Preliminary Part, Section II.

The English Acts Act, 1854 (18 Vict. Sess. 1, No. 1), adopted 11 & 12 Vict. c. 87.

Queensland.

The Act of New South Wales, 5 Will. IV. No. 8 (see pp. 63 and 64), was repealed in Queensland by 31 Vict. No. 39 ; but the provisions of 11 Geo. IV. and 1 Will. IV. c. 47, are re-enacted by sections 75 to 85 of the Succession Act of 1867 (31 Vict. No. 24), while 86 and the following sections of the same Act contain enactments similar to those of 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87.

(*u*) As to the territories at that time comprised within New South Wales, see Preliminary Part, Section I.

South Australia.

As to 11 Geo. IV. and 1 Will. IV. c. 47, being in force in South Australia, see 6 & 7 Vict. No. 2 (see Preliminary Part, Section II.).

Tasmania.

11 Geo. IV. and 1 Will. IV. c. 47, was adopted by 4 Will. IV. No. 12, s. 4.

Victoria.

So much of the Act of New South Wales, 5 Wm. IV. No. 8 (see pp. 63 & 64), as adopted 11 Geo. IV. and 1 Will. IV. c. 47, was repealed by the Real Property Statute, 1864 (No. 213); but sections 138 to 146 are similar to sections 2 to 10 of 11 Geo. IV. and 1 Will. IV. c. 47; while the 147th section corresponds with the 11th section of 11 Geo. IV. and 1 Will. IV. c. 47, as amended by the 1st section of 2 & 3 Vict. c. 60; the 148th section with the 12th section of 11 Geo. IV. and 1 Will. IV. c. 47, as amended by 11 & 12 Vict. c. 87; and the 149th section with the 2nd section of 2 & 3 Vict. c. 60.

Western Australia.

11 Geo. IV. and 1 Will. IV. c. 47, was adopted by 4 Will. IV. No. 4, and 2 & 3 Vict. c. 60, by 7 Vict. No. 13.

By the 11th section of 54 Geo. III. c. 15, an Act for the more easy recovery of debts in His Majesty's Colony of New South Wales, it was enacted that houses, lands, and other hereditaments and real estates situate within New South Wales (*x*) or its dependencies belonging to any person indebted, should be liable to and chargeable with all just debts and demands of what nature or kind soever owing by any such person, and should be assets for the satisfaction thereof in like manner as real estates were by the law of England liable to the satisfaction of debts due by bond or other specialty, and should be subject to the like remedies, proceedings, and process in any Court of law or equity in New South Wales or its dependencies, for seizing, extending, selling, or disposing of any such houses, lands, and other hereditaments and real estates towards the satisfaction of such debts and demands, and in like manner as personal estates in the colony were seized, extended, sold, or disposed of for the satisfaction of debts.

It was decided by the Judicial Committee of the Privy Council, (*y*) that this statute had not the effect of changing the nature of the tenure of the

(*x*) As to the territories then comprised within New South Wales, see Preliminary Part, Section I.

(*y*) Affirming the decision of the Supreme Court of Victoria in A'Beckett *v.* Mathewson, 1 Wyatt & Webb (Law), 29.

debtor's lands, and that on his death the creditor must bring his action against the debtor's heir, not against his executor. (*z*)

It was decided by the Supreme Court of Victoria that, in an action against the heir under this statute, it was not necessary to show that the personal estate of the deceased was exhausted. (*a*)

The 1st section of the Act of Western Australia, 25 Vict. No. 8, An ordinance to facilitate the recovery of debts, is the same as the 4th section of 54 Geo. III. c. 15, with the omission of the date and the substitution of "Western Australia" for "New South Wales."

The Imperial Act, 3 & 4 Wm. IV. c. 104, makes the real estate of a deceased debtor, which he has not by his will charged with, or devised subject to, the payment of his debts assets for the payment of his debts due on simple contract, but no such statute was required in any of the Australasian colonies in which 54 Geo. III. c. 15, s. 4, or any similar Colonial Act was in force to make lands which descended to the heir liable to the payment of simple contract debts. However, 3 & 4 Will. IV. c. 104, has been expressly adopted in Tasmania, see 6 Will. IV. No. 16, s. 10. The Act 3 & 4 Will. IV. c. 104, was in force in

(*z*) Bullen *v.* A'Beckett, 1 Moore, N. S. 223.

(*a*) McEwan *v.* Moncur, 1 Wyatt, Webb, & A'Beckett (Law), 9.

New Zealand and South Australia by virtue of the Acts of those colonies adopting the law of England, see Preliminary Part, Section II.

By the Acts abolishing primogeniture (see Chapter V.), land on vesting in the personal representative of the deceased is in most cases expressly declared to be assets for payment of his debts : see as to New South Wales, 26 Vict. No. 20, s. 2 ; as to New Zealand, 43 Vict. No. 49, s. 7 ; as to South Australia, 31 Vict. No. 21, s. 1 ; as to Tasmania, 38 Vict. No. 1, s. 5 ; as to Victoria, No. 427, s. 7. As regards Queensland, the language of the Act abolishing primogeniture (the Intestacy Act of 1877) is not so explicit. Lands of an intestate become vested in the Curator of Intestate Estates. By the 13th section the land of the intestate is to be divisible and distributable in the same manner as personal estate, and amongst the same persons, and the curator or other administrator is to administer and distribute the same accordingly. He is (s. 39) to issue advertisements calling upon the creditors of the persons whose estates, including both real and personal estate (see s. 45) he has been ordered to administer, to come in and prove their debts before him, and he is to pay the debts proved if the whole thereof can be paid, and if they cannot, then a dividend thereof ; and if he collects any further assets, he is to pay a further

dividend. This section seems necessarily to imply that the debts are to be paid out of real as well as out of personal estate.

Section IV.—Bankruptcy Rules to prevail in Administration.

(38 & 39 Vict. c. 77, s. 10.)

By the 10th section of the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), in the administration of the assets of any person who may die after the commencement of the Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, may come in under the decree or order for the administration of such estate, and make such claims against the

same as they may be entitled to by virtue of the Act.

Similar enactments have been passed in

Queensland.

See the Judicature Act (40 Vict. No. 6), 5th section, 1st sub-section.

South Australia.

See the Supreme Court Act, 1878 (41 & 42 Vict. No. 116), 6th section, 1st sub-section.

Victoria.

See the Judicature Act, 1883 (*a*), (No. 761), 9th section, 1st sub-section.

Western Australia.

See the Supreme Court Act, 1880 (44 Vict. No. 10), 8th section, 1st sub-section.

(*a*) This Act is to come into operation on 1st July, 1884.

CHAPTER IV.

DUTIES ON THE ESTATES OF DECEASED PERSONS.

New South Wales.

Duties are imposed on the real and personal estates of deceased persons by Part II. of the Stamp Duties Act of 1880 (44 Vict. No. 3), which came into operation on the 1st July, 1880 (s. 1).

Such duties were originally imposed by 29 Vict. No. 6, which came into operation on the 1st July, 1865, and was amended by 31 Vict. No. 26. These Acts were continued for successive periods by 32 Vict. No. 1, 33 Vict. No. 4, and 34 Vict. No. 20, until the 31st December, 1874. The 39th section of 29 Vict. No. 6, enacted as follows: "The duties to be levied, collected, and paid as aforesaid upon probates, . . . shall be charged and chargeable upon, and in respect of all personal property which any testator, dying after the commencement of this Act, at the time of his death shall have had power to dispose of by his will." A testator died before, but probate of his will was granted after, the 31st December, 1874. It was

decided by the Supreme Court that the probate was not liable to duty (*b*).

The duty imposed by the Stamp Duties Act of 1880, is one per cent. (Schedule II.) on all the estate real or personal which belonged to any testator or intestate dying after the commencement of the Act. A penalty is imposed upon any person taking possession of or administering any estate of any person deceased exceeding £200 in value (s. 48), without obtaining probate or letters of administration within six calendar months after the decease. Every person applying for probate or administration, must lodge an affidavit that to the best of his knowledge and belief, the estate real and personal of the deceased, exclusive of what he was possessed of or entitled to as a trustee, and after deducting the debts due and owing by the deceased is under the value of the sum specified in the affidavit (s. 49). No probate or letters of administration are to issue until the duty has been paid or security given for the same (s. 52). If the personal estate shall be insufficient to pay the duty, the Supreme Court may order that a sufficient part of the real estate may be sold to pay the duty (s. 51). Every executor or administrator may deduct from the property devised or bequeathed to any person an amount equal to the duty thereon, calculated at

(*b*) *Ex parte* Dunne, 13 New South Wales Rep. (Law) 210.

the same rate as is payable upon the estate, unless the testator has made a different disposition as to the payment of the duty on his will (*Ib.*).

The trustee of any person who executes a settlement containing any trust to take effect after his death, must give notice of such settlement, and specify the value of the settled property, and duty must be paid thereon at the same rate as on property devised or bequeathed by a will (s. 53, see also s. 55).

Although, as will be observed, debts due by the deceased are to be deducted, the Act contains no provisions such as are contained in the 31st and 32nd sections of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12 of the Imperial Parliament), for a return of duty if the estate was overvalued, or an insufficient amount was deducted on account of debts, and for a payment of further duty if the estate was undervalued, or a deduction for debts was made erroneously.

It has been decided that under this Act duty is payable on personalty in the colony, although the testator or intestate may have died domiciled elsewhere (*c*).

New Zealand.

Duties on the estates of deceased persons were

(*c*) In the Will of Rutherford, 3 New South Wales Law Rep. (Law), 178. For a similar decision in Victoria, see The Queen *v.* Smith, referred to at p. 90.

first imposed by Parts II., III., and IV. of the Stamp Duties Act, 1866 (30 Vict. No. 42). This Act was repealed by the 2nd section of the Stamp Act, 1875 (39 Vict. No. 73), the third part of which however imposed other duties on the estates of deceased persons. Part III. of the Stamp Act, 1875, was in its turn repealed by the 55th section of the Deceased Persons Estates Duties Act, 1881 (45 Vict. No. 41). The last-mentioned Act came into operation on the 1st of October, 1881, and applies only to the estates of persons dying on and after that day, and of persons who died upon or since the 1st of January, 1876 (the day when the Stamp Act, 1875, came into operation), and of whose estates no statements under the Acts repealed should have been filed before the 30th of June, 1882.

The rate of duty set forth in the schedule to the Deceased Persons Estates Duties Act, "on the estates real and personal of deceased persons upon the final balance of the estate," is as follows :—

Not exceeding £100	No duty.
Upon any amount exceeding £100 but not exceeding £1,000	£2 per cent.
Upon any amount not exceeding £5,000, on the first £1,000	£2 per cent.
And on the remainder	£3 per cent.

Upon every additional £5,000, or any part thereof up to £20,000 as follows :—

On the first additional £5,000 or any part thereof	£4 per cent.

On the second additional £5,000, or any part thereof . . . . . £5 per cent.
And on the third additional £5,000, or any part thereof . . . . . £6 per cent.

Upon every additional £10,000, or any part thereof up to £50,000 as follows :—

On the first additional £10,000, or any part thereof . . . . . £7 per cent.
On the second additional £10,000, or any part thereof . . . . . £8 per cent.
And on the third additional £10,000, or any part thereof . . . . . £9 per cent.
Upon any excess over £50,000 . . . £10 per cent.

No duty is payable in respect of any real or personal property to which any widow becomes absolutely entitled by reason of the husband's intestacy or under his will (sec. 36), and in the case of the children or grandchildren of the deceased, the duty on the property devolving on them is reduced by one half (s. 37). Subject to any direction as to the payment of the duty which may be contained in the will of the deceased, the executor (s. 3) or administrator is to apportion the charge thereof rateably, according to the value of their several interests amongst the persons beneficially entitled (s. 12).

Every executor and administrator must within six months from the grant of probate (s. 3) or administration, file a statement of the real and personal property of or to which the deceased was seised, possessed, or entitled, at the time of his death, and of the value thereof, and of the balance after deducting all debts due by the deceased, and

the funeral and testamentary expenses (s. 5). It is upon this balance, after it has been certified by the commissioner of stamps, that duty is payable (s. 7). The property in respect of which the duty is payable, is all real and personal property situated in New Zealand, including all debts, moneys, and choses in action receivable or recoverable in New Zealand, which becomes vested in the executor (s. 3) or administrator as such, notwithstanding that the deceased had at the time of his death a foreign domicile (s. 8). The duty is to be paid immediately upon the statement being certified, but power is given to the commissioner either to extend the time for payment, or to demand payment of the duty before he certifies the statement (s. 9). The probate or letters of administration is not receivable in evidence unless stamped with stamps denoting that the duty has been paid, or that no duty is payable (ss. 42 and 43), but the commissioners may deliver the probate or letters of administration to the executor or administrator upon his receiving security for the payment of the duty (s. 10).

If it shall be discovered that too little duty has been paid, the statement is to be amended, and additional duty paid (s. 31). If it shall be discovered within two years after the payment that too much duty has been paid, the amount may be returned (s. 32).

The trustees of any settlement made by any person containing dispositions to take effect after his death, must register the same, and within six months after the death of the settlor, file a statement setting forth the property comprised in the settlement and the value thereof, and pay duty upon the balance according to the rate paid in like manner as the duty payable in respect of a probate or letters of administration (ss. 22, 23, and 25); the duty is a first charge upon the real and personal estate (s. 26), and if the personal estate is insufficient to pay it, the executor, administrator, or trustee may apply to the Supreme Court, which may order a sufficient part of the real estate to be sold to pay the duty (s. 27). If the duty is not paid, the commissioner may apply to the Supreme Court, which may order a sufficient part of the real or personal estate to be sold (s. 28).

Queensland.

Probate and administration duties were imposed by the Stamp Duties Act of 1866 (30 Vict. No. 14), according to the scale mentioned in the second schedule to the Act.

By the 30th section of the Intestacy Act of 1877 (41 Vict. No. 24), no duty is to be charged or chargeable under the Stamp Duties Act of

1866, in respect of any land whereof administration is granted under the Intestacy Act of 1877.

The second schedule of the Stamp Duties Act of 1866 is as follows:

"The Duties on Probates of Wills and Letters of Administration, and on Legacies, and Successions to Real and Personal Estate.

Probate of a will and letters of administration with a will annexed, where the effects as sworn to by the executor or administrator shall be—

	£	s.	d.
Under the value of £50	0	10	0
„ „ £100	1	0	0
Above the value of £100, and under £200 .	2	0	0
„ „ £200, „ £300 .	3	0	0
„ „ £300, „ £400 .	4	0	0
„ „ £400, „ £500 .	5	0	0
And above £500	£1 per cent.		

Letters of administration without a will annexed, where the effects as sworn to by the administrator, shall be—

	£	s.	d.
Under the value of £50	0	15	0
„ „ £100	1	10	0
Above the value of £100, and under £200 .	3	0	0
„ „ £200, „ £300 .	4	10	0
„ „ £300, „ £400 .	6	0	0
„ „ £400, „ £500 .	7	10	0
And above £500	£1½ per cent."		

There are provisions requiring an affidavit from the executor or administrator that the estate and effects of which probate or administration is sought to be obtained are under a certain value, for the

case of too high or too low a duty having been paid, and for giving credit for the duty upon the executor or administrator giving security.

South Australia.

Duties are imposed in South Australia on the real and personal estates of deceased persons by the Probate and Succession Duty Act, 1876 (39 & 40 Vict. No. 35), as follows:

On probate of a will or letters of administration with the will annexed, when the effects sworn to shall be—

	£	s.	d.
Under the value of £100	1	0	0
Above the value of £100, and under £200	2	0	0
„ „ £200, „ £300	3	0	0
„ „ £300, „ £400	4	0	0
„ „ £400, „ £500	5	0	0
Above £500	£1 per cent.		

On letters of administration without a will annexed, when the effects sworn to shall be—

	£	s.	d.
Under the value of £100	1	10	0
Above the value of £100, and under £200	3	0	0
„ „ £200, „ £300	4	10	0
„ „ £300, „ £400	6	10	0
„ „ £400, „ £500	7	10	0
Above £500	£1½ per cent.		

On succession to real and personal estate—

When the successor shall be the lineal descendant or lineal ancestor of the predecessor, a duty upon the value of the succession at the rate of . . .	£1 per cent.

When the successor shall be a brother or sister, or a lineal descendant of a brother or sister of the predecessor, a duty upon the value of the succession of	£3 per cent.
When the successor shall be a brother or sister of the father or mother, or the descendant of the brother or sister of the father or mother of the predecessor, a duty upon the value of the succession of	£5 per cent.
When the successor shall be a brother or sister of the grandfather or grandmother of the predecessor, a duty upon the value of the succession of . . .	£6 per cent.
When the successor shall be in any other degree of collateral consanguinity to the predecessor than is heretofore described or shall be a stranger in blood to him, a duty upon the value of the succession of	£10 per cent.

The rate of duties on successions thus fixed by the second schedule of this Act, is the same as that fixed by the 10th section of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), except that the Colonial Act omits the words "or a descendant of the brother or sister of the grandfather or grandmother," which in the Imperial Act occur after the words "where the successor shall be a brother or sister of the grandfather, or grandmother."

The 2nd section of Act No. 225, 44 & 45 Vict., "An Act to amend the Probate and Succession Duty Act, 1876," assented to 18 November, 1881, enacts as follows: "The probate duties imposed by the principal Act shall not hereafter be charge-

able upon the property belonging to the estate of any deceased person in any case where the whole value of such property, after deducting the debts of such deceased person, does not exceed the sum of one thousand pounds ; nor shall succession duties be charged upon any portion of an estate of such value given to, or passing to, or for the benefit of the lawful children of such deceased person." Having regard to the title and preamble of the Probate and Succession Duty Act, 1876, the expression "probate duties" in the 2nd section of Act No. 225, would probably be held to include administration duties.

By the 34th section of the Probate and Succession Duty Act, 1876, no succession duty is payable upon any property given to or passing for the benefit of the husband or wife of the predecessor, where the succession shall be of less value than £20, or upon any estate where the whole of such estate and effects does not exceed £50. Every person applying for probate or administration, must lodge an affidavit that the real and personal estate of the deceased within the colony, exclusive of what he was possessed of or entitled to as a trustee, and not beneficially, and exclusive of the amount of the debts and liabilities of the deceased, which his estate (if any) out of the colony shall be insufficient to pay and liquidate, are under the value of a certain sum to be therein specified to

the best of the knowledge, belief, and information of the person applying. It is on the sum specified in the affidavit that the probate or administration duty is assessed (s. 6). The executor or administrator must, within twelve months from the grant of probate or letters of administration, or such extended period as the commissioner of inland revenue may allow, file a statement (to be verified by affidavit) specifying particulars of the real and personal estate of or to which the deceased was at his death possessed or entitled within the colony, and of the value thereof; and also if any such deduction as above mentioned has been made from such value for or in respect of any debts or liabilities of the deceased, particulars of such debts and liabilities, and of the payment and satisfaction thereof, and of the real and personal estate of the deceased out of the colony, and of the administration and value thereof, and all other particulars necessary to show with certainty the duty payable (s. 7). If it appears that too little duty has been paid, the additional duty must be paid (s. 8), and if too much has been paid, the amount overpaid may be repaid (ss. 9 and 19). The duty is to be repaid rateably out of the various portions of the property according to the value of such portions respectively, and if the person entitled to any portion of the real estate of the deceased, shall not repay to the executor or administrator a

sufficient sum to defray the duty payable in respect of such real estate, the executor or administrator may apply to the Supreme Court, which may order that a sufficient part of such real estate may be sold to pay the duty (s. 10).

The commissioner may give credit for the duty (s. 16), and no probate or letters of administration is to be issued until the duty has been paid or security given for it (s. 12).

The definitions of "personal property," "property," "real property," "succession," and "trustee," correspond *mutatis mutandis* with those contained in the Succession Duty Act, 1853 (16 & 17 Vict. c. 51).

The sections of the Probate and Succession Duty Act from 21 to 27 correspond with the sections of the Succession Duty Act, 1853, from 2 to 8, those from 28 to 32 with those of the Imperial Act from 11 to 15, section 33 with section 17, sections 35 to 37 with sections 20 to 22 (the Colonial Act, however, containing no table of the value of annuities), section 38 with section 25, section 39 with section 27, sections 40 and 41 with sections 29 and 30, section 42 with section 8; ss. 43, 44, 45, and 46 with ss. 8, 10, 11, 12, and 14 of 36 Geo. III. c. 52 (the Legacy Duty Act), "personal property" or "succession" being substituted in the Colonial Act for "legacy" in the Imperial Act): sections 47 to

60 with sections 33 to 46 of the Succession Duty Act, 1853, and sections 61, 62, 63, 64, 66, 67, and 69 with sections 52, 47, 48, 49, 50, 51, and 53 of that Act.

Tasmania.

Duties on successions to real and personal property in Tasmania were imposed by the Succession Duty Act (29 Vict. No. 34) of that colony, but that Act was repealed by the Probate Duties Act (32 Vict. No. 1). The duty under this Act is payable on the personal estate of the deceased if its net value is not less than £100. The duty is at the rate of 2 per cent. upon the net value of the personal estate when it is less than £500, and at the rate of 3 per cent. if the net value exceeds £500 (s. 2). The Supreme Court may not grant probate or letters of administration without requiring from the person applying for it or them, or from some other competent person an affidavit that the personal estate of the deceased, including his leasehold estates, for or in respect of which the probate or letters of administration is or are to be granted exclusive of what he was possessed of or entitled to as a trustee for any other person and not beneficially, are under the value of a certain sum to be specified in the affidavit. An affidavit may also be filed of the debts, if any, chargeable on the personal estate of the deceased.

In estimating the net value for the purpose of the duty, the amount of such debts is to be deducted from the value of the personal estate (s. 4). The person making the affidavit is required by the Act 45 Vict. No. 12 (s. 2), to file an inventory with the estimated value of each particular specified in it. No duty is payable on the amount received on any policy on the life of the deceased where, at the time of his death, it was held by him for his wife or child (the Probate Duties Act, s. 16). The duty must be paid before probate or administration is granted (*Ib.* s. 2), and any person administering the estate of the deceased without obtaining probate or letters of administration within six months after the decease, is liable to a penalty (s. 3). Within twelve months after the grant of probate or administration, the executor or administrator must file an account, verified by affidavit, of the assets and liabilities (s. 5), and if it then appears that too little duty has been paid, the difference between the amount paid and the proper amount must be paid (s. 6); while if too much has been paid, the excess is to be repaid (s. 7).

Victoria.

Duties are imposed in Victoria on the estates of deceased persons by the Duties on the Estates of Deceased Persons' Statute, 1870 (Act No. 388), amended by the Duties on Estates Amendment

Act, 1871 (No. 403), and the Duties on Estates Amendment Act, 1876 (No. 523).

The rate of duty fixed by the operation of the Schedule to the Duties on the Estates of Deceased Persons Statute, 1870, and of the Duties on Estates Amendment Act, 1876, is as follows :—

On the estates, real and personal, of deceased persons :—

Where the total value of such estates after deducting all debts, does not exceed £1,000	£1 per cent.
Where the value exceeds £1,000, and does not exceed £5,000	£2 per cent.
Where the value exceeds £5,000, and does not exceed £10,000	£3 per cent.
Where the value exceeds £10,000, and does not exceed £20,000	£4 per cent.
Where the value exceeds £20,000, and does not exceed £30,000	£5 per cent.
Where the value exceeds £30,000, and does not exceed £40,000	£6 per cent.
Where the value exceeds £40,000, and does not exceed £60,000	£7 per cent.
Where the value exceeds £60,000, and does not exceed £80,000	£8 per cent.
Where the value exceeds £80,000, and does not exceed £100,000	£9 per cent.
And over the value of £100,000	£10 per cent.

When any person dies intestate, leaving a widow and children or grandchildren (see the 2nd section of the Duties on Estates Amendment Act, 1871) the only persons entitled in distribution to his estate, the duty is to be calculated at one-half of the percentage mentioned in the Schedule ;

when any person dies intestate leaving a widow and no children, the duty is to be calculated so as to charge one-half only of the duty upon the distributive share of such widow; when any person dies intestate, leaving children (*d*) the only persons entitled in distribution to his estate, the duty shall be calculated at one-half only of the percentage mentioned in the Schedule; when the widow of a testator, or widow and children or grandchildren of a testator, or children or grandchildren of a testator, are the only persons entitled under his will, the duty is to be calculated at one-half only of the percentage mentioned in the Schedule; and when other persons are entitled under such will, the duty is to be calculated so as to charge only one-half of the percentage mentioned in the Schedule upon the property devised or bequeathed to the widow of a testator, or widow

(*d*) By the 2nd section of the Act of 1871 the word "children" in the 24th section of the Act of 1870 is to mean and include "grandchildren." The case of an *intestate* leaving children, the only persons entitled in distribution to his estate was not provided for, although the case of the children of a *testator* being the only persons entitled under his will was, by the 24th section of the Act of 1870. The 3rd section of the Act of 1871, however, provides for the case of a person who "dies intestate leaving *children* the only persons entitled in distribution to his estate," but as the enactment in the 2nd section of the Act of 1871 is that the word "children" in the 24th section of the Act of 1870 shall mean "grandchildren," the question arises whether the case of an *intestate* leaving *grandchildren* only has been provided for by the 3rd section of the Act of 1871.

and children or grandchildren of a testator, or children or grandchildren of a testator.

By the Act of 1876 the percentage of duty when the estate is over the value of £20,000, was made higher than that fixed by the Act of 1870. A testator died before, but probate of his will was granted after, the coming into operation of the Act of 1876. It was held by the Judicial Committee of the Privy Council (*e*), reversing the decision of the Supreme Court (*f*), that the percentage payable was that fixed by the Act of 1870.

If the property bequeathed to the widow, children, or grandchildren of the testator is vested in them, though subject to be divested on the happening of a contingency, the duty on their shares is to be calculated at the half of the ordinary percentage, as was decided by the Judicial Committee of the Privy Council (*g*) reversing the decision of a judge of the Supreme Court (*h*). It had been previously decided by the Supreme Court (*i*) by a majority, that where a child had not, at the time of the testator's death, a vested interest, the bequest being to such child or children of the testator as should attain the age of twenty-one years, the

(*e*) Bell *v.* The Master in Equity, 3 App. Cas., 560.

(*f*) 2 Victorian Law Rep. (Ins. Prob. & Matr.) 71.

(*g*) Armytage *v.* Wilkinson, 3 App. Cas., 355.

(*h*) See *in re* Armytage, 3 Victorian Law Rep. (Ins. Prob. and Matr.) 41.

(*i*) In the Will of Wilsmore, 2 Victorian Law Rep. (Ins. Prob. & Matr.) 30.

full rate was payable, but the correctness of this decision is very questionable (*k*).

Every executor and administrator (see ss. 7 and 10 of the Administration Act, 1872, referred to *ante*, p. 47), must within two months (*l*) from the granting (*m*) to him of probate or letters of administration file a statement containing particulars of the real and personal estate of or to which the deceased was seised, possessed, or entitled at his death, and of the value thereof, of the debts due by him, and of the balance (if any) after deducting the amount of the debts from the value of the estate (Act No. 388, s. 7). It is upon this balance that the duty is to be paid (*Ib.* s. 8). The duty must be paid within four calendar months from the grant of probate or letters of administration (see Rules of 13th November, 1876).

The Supreme Court decided in one case (*n*) that if a person dies domiciled in Victoria leaving personal property (not being chattels real) outside

(*k*) See Armytage *v.* Wilkinson, 3 App. Cas. at 374; In the Estate of Henty, 4 Victorian Law Rep. (Ins. Prob. and Matr.) at 60.

(*l*) See Rules of 2 February, 1871, made by the Governor with the advice of the Executive Council, under the 5th section of the Duties on the Estates of Deceased Persons Statute, 1870.

(*m*) Granting is distinguished in the Act from the issuing of the probate or letters of administration; compare ss. 7 and 12.

(*n*) The Queen *v.* Blackwood, 7 Victorian Law Rep. (Law) 400.

the colony it is liable to the duty under this Act; and in another case (*o*), upon the authority of the former, that if a person dies domiciled beyond, but leaving personal property in, Victoria, that property is not liable to the duty. But the former decision was reversed by the Judicial Committee (*p*), and as the reversal seemed necessarily to amount to an overruling of the latter, the Supreme Court has since decided that personal property in Victoria is liable to the duty, although the deceased was not domiciled in the colony (*q*).

No probate or letters of administration are to issue (*r*) until the duty is paid (s. 8). There are provisions (ss. 13 and 14) for additional duty being paid where too little has been paid in the first instance, and for a return of duty where too much has been paid in consequence of debts being discovered subsequently to the filing of the statement. Every executor or administrator, with the will annexed, is to deduct from every devise, bequest, and legacy (unless the testator has made a different disposition as to the payment of the duty) an amount equal to the duty upon such

(*o*) In the Will of Bagot, *ibid.* (Ins. Prob. and Matr.) 106.

(*p*) Blackwood *v.* The Queen 8 App. Cas. 82.

(*q*) The Queen *v.* Smith, decided December, 1883. See for a decision on the Act of New South Wales, In the Will of Rutherford, referred to at p. 73.

(*r*) See note (*m*), *ante*, p. 89.

devise, bequest, or legacy, calculated at the same rate as is payable upon the estate under the Act.

A duty at the same rate as that in the Schedule is to be paid upon every settlement made by any person containing trusts or dispositions to take effect after his death, and the trustees, or some other person interested under the settlement, must upon the death of the settlor file a statement setting forth the nature of the property comprised in the settlement and its value (s. 20).

CHAPTER V.

THE LAWS OF THE AUSTRALASIAN COLONIES AS TO SUCCESSION AND INHERITANCE.

SECTION I.—SUCCESSION TO PERSONAL ESTATE.

THE principal statute which in England regulates the manner in which an intestate's personal estate (in which expression is included chattels real, that is, leaseholds), shall be distributed among his next of kin, is 22 & 23 Car. 2, c. 10, commonly called the Statute of Distributions. This statute has always been in force in the Australasian Colonies (see Preliminary Part, Section II.), as has been repeatedly taken for granted in the various Supreme Courts (*a*).

In Queensland, ss. 29 to 33 of the Succession Act of 1867 (31 Vict. No. 24) are the same (with the substitution of the "Supreme Court" for "ordinaries" and "ordinary") as the 5th, 6th,

(*a*) See, for instance, Skeeles *v.* Hughes, 3 Victorian Law Rep. (Eq.) 161. For a statutory recognition that the Statute of Distributions is in force in Victoria, as to land held for a term of years, see Act No. 230, s. 4 (now repealed).

7th, 8th, and 9th sections of the Statute of Distributions.

The statute 11 Geo. 4 and 1 Will. 4, c. 40, "An Act for making better provision for the disposal of the undisposed residues of the effects of testators," enacts that executors are to be trustees for the persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of.

In New South Wales (which then comprised the present colonies of Victoria and Queensland) this statute was adopted by 5 Will. 4, No. 8.

As to 11 Geo. 4 & 1 Will. 4, c. 40, being in force in New Zealand, see 21 & 22 Vict. No. 2, referred to in Preliminary Part, Section II.

In Queensland, the Act of New South Wales, 5 Will. 4, No. 8 (*vide supra*), was repealed by the Repealing Act of 1867 (31 Vict. No. 39), but the 34th and 35th sections of the Succession Act of 1867 (31 Vict. No. 24) correspond with the 1st and 2nd sections of 11 Geo. 4 & 1 Will. 4, c. 4.

As to 11 Geo. 4 & 1 Will. 4, c. 40, being in force in South Australia, see 35 & 36 Vict. No. 9 (see Preliminary Part, Section II.).

In Tasmania, 11 Geo. 4 & 1 Will. 4, c. 40, was adopted by 4 Will. 4, No. 12.

In Victoria, 11 Geo. 4 & 1 Will. 4, c. 40, was originally in force by virtue of the Act of New South Wales, 5 Will. 4, No. 8 (*vide supra*).

That Act, so far as it adopted 11 Geo. 4 & 1 Will. 4, c. 40, was repealed by the Wills Statute, 1864 (Act No. 222), but the 32nd and 33rd sections of that Act are the same as the 1st and 2nd sections of 11 Geo. 4 & 1 Will. 4, c. 40.

In Western Australia, 11 Geo. 4 & 1 Will. 4, c. 40, was adopted by 6 Will. 4, No. 4.

Section II.—Inheritance of Real Estate.

(*a*) *The Former Law.*

The enactments which in England regulate the descent of real estate upon the intestacy of a deceased owner are 3 & 4 Will. 4, c. 106, "An Act for the Amendment of the Law of Inheritance," and the 19th section of 22 & 23 Vict. c. 35.

New South Wales.

The statute 3 & 4 Will. 4, c. 106, was adopted in New South Wales (in which the present colonies of Victoria and Queensland were then comprised), by the Act of the Legislature of that colony, 7 Will. 4, No. 8. But see 26 Vict. No. 20, referred to, *post*, p. 97.

The 20th section of the Trust Property Act of 1862, 26 Vict. No. 12, is identical with the 19th section of 22 & 23 Vict. c. 35.

New Zealand.

In New Zealand 3 & 4 Will. 4, c. 106, was in force by virtue of the Act of the Legislature of that colony, 21 & 22 Vict. c. 2 (see Preliminary Part, Section II.). But see 43 Vict. No. 49, referred to, *post*, p.100.

In New Zealand the law of England has been altered in favour of the next-of-kin of illegitimate intestates, and of the illegitimate children of intestates (see *post*, p. 102).

Queensland.

The Statute of New South Wales, 7 Will. 4, No. 8, which adopted 3 & 4 Will. 4, c. 106 (see *ante*, p. 94), was repealed as regards Queensland by the Repealing Act of 1867 (31 Vict. No. 39).

The 1st, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, and 24th sections of the Succession Act of 1867 (31 Vict. No. 24) are similar to ss. 1 to 10 of 3 & 4 Will. 4, c. 106; ss. 25 and 26 (which enact that there shall be no escheat of property if held upon trust or mortgage), to ss. 46 and 47 of the Trustee Act, 1850 (13 & 14 Vict. c. 60); and s. 28 (relating to estates *pur auter vie*), to the 6th section of 7 Will. 4 & 1 Vict. c. 26 (the Statute of Wills). But see 41 Vict. No. 24, referred to, *post*, p. 102).

South Australia.

In South Australia, 3 & 4 Will. 4, c. 106, was in force by virtue of the Act of the Legislature of that colony, 35 & 36 Vict. No. 9 (see Preliminary Part, Section II.). But see 31 Vict. No. 29, referred to, *post*, p. 104.

Tasmania.

The Statute 3 & 4 Will. 4, c. 106, was adopted in Tasmania by the Act of the Legislature of that colony, 6 Will. 4, No. 16, s. 11. The 19th section of 24 Vict. No. 2, is similar to the 19th section of 22 & 23 Vict. c. 35. But see 38 Vict. No. 1, referred to, *post*, p. 105.

Victoria.

In Victoria the Act of New South Wales, 7 Will. 4, No. 8 (see p. 94) was repealed by the Real Property Statute, 1864 (Act No. 213), the First Part of which, however, re-enacted all the provisions of 3 & 4 Will. 4, c. 106, and also contains a section identical with the 19th section of 22 & 23 Vict. c. 35. As will, however, be seen presently, this First Part is, by reason of the Acts No. 223 (see s. 16) and No. 230, which were passed the same day, practically inoperative. See *post*, p. 106.

Western Australia.

The Statute 3 & 4 Will. 4, c. 106, was adopted in Western Australia by the Act of the Legislature of that colony, 4 Will. 4, No. 4, and 22 & 23 Vict. c. 35, by the Act 31 Vict. No. 8.

The laws of the Australasian Colonies as to the inheritance of real estate were thus originally the same as the common law of England, and afterwards as the statute law upon the subject.

(*b*) *The Present Law.*

In all these colonies, however, with the exception of Western Australia, the law has been altered, and the law as to succession to real estate has been in some instances altogether and in the others to a great extent assimilated to the law as to succession to personal estate.

New South Wales.

The Act by which this alteration was effected in New South Wales is the Real Estates of Intestates Distribution Act of 1862 (26 Vict. No. 20), which took effect from and after 1st July, 1863. The first section provides that all land which by the operation of the law then in force would, upon the death of the owner intestate in respect of such land, pass to his heir-at-law, shall instead thereof

pass to and become vested in his personal representative, as was then the case with chattel real property.

The 2nd section provides that lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application for debts or otherwise. Provided that nothing therein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife, or in the produce thereof upon sale, than a tenancy for life by the curtesy; nor to any widow a greater interest in the real estate of her husband intestate than the rights she would otherwise have had as doweress thereon; and provided also that in case of the sale of any such real estate by virtue of the Act, provision shall be made, by order of the Court or Judge, for securing out of the produce of the sale such payments as shall be equivalent to the right of such husband or wife as tenant by the curtesy or doweress.

The 3rd section provides that it shall be lawful for a Judge, upon the application of the administrator, or of any person beneficially interested, to order and direct (among other matters) the course of proceedings which shall be taken in regard to the time and mode of sale, and the expediency and mode of effecting a partition, if applied for.

It was held by Mr. Justice Hargrave (*b*), the Primary Judge in Equity, first, that the Act confers on the administrator a statutory title in all the real estate of an intestate, without the intervention of any order of sale by the Court or a Judge; secondly, that the second proviso in the 2nd section primarily refers to sales under the order and direction of a Judge, as provided for by the 3rd section; thirdly, that where the administratrix, the widow of the intestate, had (not under the order or direction of a Judge) sold his real estate, she was entitled to dower only out of the proceeds of the sale, reckoned as if invested in Government Debentures at 6 per cent., one-third of such income to form the basis of the calculation of the present value of an annuity for her life; lastly, that she was entitled to retain for her dower, out of the balance in hand, the value of such an annuity.

The Supreme Court has held (*c*) that an application under the 3rd section may be in a summary way, and without a suit for the administration of the estate.

The 4th section gives a Judge, if satisfied that a partition of the land would be advantageous to the parties interested therein, power to appoint

(*b*) In the Intestate Estate of Murphy, 6 New South Wales Rep. (Eq.) 63.

(*c*) In the Matter of Carvell deceased, 3 New South Wales Rep. (Law) 354.

arbitrators to effect such partition, and contains other provisions on the subject.

New Zealand.

By the Real Estate Descent Act, 1874 (38 Vict. No. 84) all undevised land was on the owner's death to pass to and become vested in his personal representative, and was to be distributable and disposable in like manner as personal assets.

This Act was repealed by the 3rd section of the Administration Act, 1879 (43 Vict. No. 49).

By the 6th section of the latter Act, immediately upon the granting of probate of the will or administration of the estate of any deceased person, all the real estate of such person, whether held by him beneficially or in trust, shall vest in the executor or administrator, as the case may be, whose title shall, so far as relates to persons dying after the Act comes into operation, relate back to and be deemed to have arisen immediately upon the death of such person. By the 7th section the real estate of every deceased person shall be assets in the hands of his executor or administrator for the payment of his debts in the ordinary course of administration. By the 10th section the executor or administrator shall, subject to the provisions of the Act, hold the real estate "of any person who

dies leaving a will according to the trusts and dispositions of such will," "of any person who dies intestate as to such real estate after this Act came into operation, upon trust for the person or persons who, if such real estate were personal estate, would be entitled to such personal estate," "of any male person who shall have died after the 1st of October, 1875" (the day when the Real Estate Descent Act, 1874, came into operation), "and before this Act comes into operation, intestate as to such real estate, leaving him surviving a wife or child or children or any lineal descendant, upon trust for the person or persons who would have been entitled thereto under the Real Estate Descent Act, 1874, if this Act had not been passed;" "of any person (other than a male person leaving him surviving a wife or child or children or any lineal descendant), dying intestate as to such real estate after the first day of October, 1875, and before this Act comes into operation, upon trust for the person or persons who would have been entitled if this Act had not been passed;" "of any person who died on or before the 1st day of October, 1875, intestate as to such real estate, upon trust for the persons who would have been entitled if the Real Estate Descent Act, 1874, and this Act had not been passed." The 11th section contains provisions relating to a partition of the real estate, if the Court is satisfied

that a partition would be advantageous to the persons interested therein.

By the 35th, 36th, and 37th sections of the Administration Act, 1879 (43 Vict. No. 49), if a male illegitimate dies intestate, leaving no issue, his widow and mother (if surviving) succeed in equal shares to his real and personal estate: if his mother is dead at the time of his death, his widow succeeds to his whole estate: if he leaves no widow, his mother, or, if she is dead, her next of kin succeed to the whole of his estate, excluding his father and all persons claiming through him; if a female dies intestate, leaving no husband or legitimate children or their issue, but leaving illegitimate children or their issue such illegitimate children or their issue succeed to her real and personal estate in all respects as if they were legitimate. And if an illegitimate female leaves no legitimate or illegitimate children or their issue, and no husband, then her mother, or if she is dead her mother's next of kin succeed.

Queensland.

By the 11th section of the Intestacy Act of 1877 (41 Vict. No. 24), which came into operation (see s. 57) on the 1st of July, 1878, whenever any person shall not by his will have disposed of any land within the colony to which at the

time of his decease he is entitled, such land shall, instead of descending to his heir-at-law, pass to and become vested in the Curator of Intestate Estates. By the 12th section the Supreme Court or a Judge may, by a grant of letters of administration, appoint any person to be administrator of such land, and upon such appointment being made all such land shall be divested from the Curator, and become vested in the administrator.

By the 13th section all land of any deceased person, whereof he shall not have disposed by his will, shall be divisible and distributable in the same manner as personal estate is divisible and distributable, and amongst the same persons, and the Curator or administrator is to administer and distribute the same accordingly by the 14th section.

The title of the administrator is, without invalidating any Acts previously done by the Curator, to relate back to the death of the owner.

The 22nd and 23rd sections contain provisions authorizing the Supreme Court or a Judge to order a partition of the land if satisfied that it would be advantageous to the persons interested therein.

By the 24th section no land passing under the Act shall be sold by the Curator or any administrator without the consent of all persons

beneficially interested, or the order of the Supreme Court or a Judge thereof for that purpose first obtained, and no such order is to be made without such consent before the expiration of one year from the date of the letters of administration.

The 28th section enacts that from the commencement of the Act, estates or rights of dower or by the curtesy of England, shall not be claimed or allowed in favour of any widow or widower as to lands in respect of which the husband or wife shall thereafter die seised.

South Australia.

The Intestate Real Estates Distribution Act, 1867 (31 Vict. No. 29), enacts (s. 1) that all lands of which any person shall die seised or possessed without devising the same, or which he shall only partially devise, shall pass to and become vested in his personal representative, who shall hold them and the unapplied proceeds thereof, in case the same shall be sold for division or distribution in like manner as is the case with chattel real property, and such lands shall be distributable and disposable as personal assets without distinction as to order of application in the payment of debts or otherwise. By the 2nd section the title of the personal representative to

whom letters of administration or probate shall have been granted, is to relate back to the death of the owner. By the 3rd section no widow shall be entitled to her dower, nor husband to his curtesy out of any lands which shall pass under the Act. The 8th section gives the Supreme Court power, when satisfied that it would be advantageous to the parties interested therein, to give directions as to a partition of the land.

Tasmania.

The Deceased Persons' Estates Act, 1874 (38 Vict. No. 1) came into operation on the 1st of October, 1874 (see s. 2.)

By the 4th section, "all land which by the operation of the law relating to real property now in force would, upon the death of the owner intestate in respect of such land, descend to his heir at law, shall instead thereof, pass to and become vested in his personal representatives in like manner as is now the case with chattel real property, free from all claim to dower on the part of the widow of the intestate, and from any tenancy by the curtesy where such would have arisen under the existing law."

By the 5th section, "land held on trust or by way of mortgage, passing to the personal representative of an intestate under this Act, shall be

subject to the same trusts and equities as the same would have been subject to if they had descended to the heir, and all other lands so passing shall be disposable in like manner as other personal assets without distinction as to order of application for payment of debts or otherwise."

The 7th section gives a Judge of the Supreme Court, when satisfied that it would be advantageous to the parties interested, power to give directions as to the partition of the land.

By the 14th section the title of the administrator to the land is to relate back to the death of the owner.

By the 12th section the real estate of every deceased person is made assets in the hands of his executor or administrator for the payment of his debts and funeral and testamentary expenses, and he may sell or mortgage the same; but in the case of an executor, such power is not to be exercised contrary to the provisions of the will, except with the sanction of a Judge.

Victoria.

The law of primogeniture was first abolished in Victoria by the 16th, 17th, and 18th sections of the Act No. 223, "An Act to further amend the Real Property Act, and for other purposes," as to land under that Act, and as to all other

land by the 4th, 5th, and 6th sections of the Act No. 230, "An Act to make undevised real estate distributable among next of kin, and to provide for the administration of the estates of deceased persons in certain cases." The sections above referred to of the former Act applied to the estate of any person dying intestate after the passing of the Act, 2nd June, 1864, and the latter Act (see s. 2) came into operation on the 1st July, 1864. The sections of the two Acts dealing with succession were almost identical. They provided that the Supreme Court, in every case in which it should be satisfied that the owner of any freehold land had died intestate as to such land, might grant a rule that such land should be dealt with as if it had been held for a term of years, and commit the administration thereof to any person as administrator, whereupon it was to vest in the administrator thereof, and to be assets in his hands and be distributed in the same manner as if such land had been held for a term of years by the deceased and he had died intestate as to the same. There was an exception in the case where a married woman should be the owner of the land and should die leaving her husband surviving, in which case he was to stand in the same position with respect to the distribution of such land as she would have stood in with respect to the dis-

tribution of his personal estate had he died intestate leaving her surviving.

It was decided by Mr. Justice Moleworth, in *Martin* v. *Dalton* (*d*), that the interpretation to be put upon this exception was that "a widower should stand in the same position with respect to the distribution of such land of his deceased wife, regard being had to her leaving or not leaving children, as she would have stood in with respect to the distribution of his personal estate, regard being had to his leaving or not leaving children." It is presumed that the learned Judge intended that after "children," such words as "or the lineal descendants of deceased children" are to be understood.

The whole of Act No. 223 (except sections 23, 24, and 25, which have no bearing on the present question) was repealed by the 2nd section of the Transfer of Land Statute (Act No. 301); but the 67th, 68th, and 69th sections of this Act corresponded with and were a re-enactment of the 16th, 17th, and 18th sections of Act No. 223.

The 2nd section of the Administration Act, 1872, Act No. 427, which came into operation on 1st January, 1873 (see s. 1), repealed the 67th, 68th, and 69th sections of the Transfer of Land Statute (as well as the 70th, 71st, 72nd,

(*d*) 1 Victorian Law Rep. (Eq.) 69.

73rd, and 74th sections, which were subsidiary to the 67th, 68th, and 69th sections); and also the 4th, 5th, and 6th sections of the Act No. 230 (as well as the 7th, 14th, and 32nd sections); and the law in Victoria as to the succession to real estate upon the death of a deceased owner is now regulated by the 5th, 6th, 7th, 8th, and 9th sections of the Administration Act, 1872.

These sections enact that the Supreme Court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property, whether real or personal, within the Colony of Victoria; that upon such a grant all the hereditaments of such person, whether held by him beneficially or in trust, shall vest as from the death of such person in the executor or administrator as the case may be, and shall be assets in his hands for the payment of his debts in the ordinary course of administration, and that he shall have power to sell, mortgage, and convey the same to a purchaser as fully as the testator or intestate could have done in his lifetime; and that subject to the provisions of the Act, the real estate of a deceased person, if he has devised such estate by his or her will, shall be held by the executor or administrator according to the trusts and dispositions of the will, and if he or she has died intestate as to such real estate and before

the 1st July, 1864 (*e*), upon trust for his or her heir-at-law, and if after the 1st July, 1864, upon the same trusts as if a rule had been granted for the administration of such estate under the law in force before the Administration Act, 1872, came into operation, that is for the persons entitled under the Statute of Distributions, with the exception that if the deceased person was a married woman who left her husband her surviving, he is to take, if she left children, or the lineal descendants of children, one-third ; or if she died without leaving children or the lineal descendants of children, one-half of the real estate.

It has been decided by the Supreme Court that, although by the Administration Act, 1872, upon the grant of probate or letters of administration, the hereditaments of a deceased intestate vest as from the death of such person in the administrator, yet until there has been a grant of administration, they vest in the heir-at-law (subject to be divested on a grant of administration being made to any other person) who may maintain ejectment (*f*).

(*e*) The date when Act No. 230 came into operation ; see *ante*, p. 107.

(*f*) Larkin *v.* Drysdale, 1 Victorian Law Rep. (Law) 164.

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THE END.

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